Supreme Court, U.S.
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07-595

No. 07-____

IN THE

Supreme Court of the United States

ALAM SHER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a government employee, who has not been granted immunity or otherwise received notice that his answers in an administrative investigation may not be used to incriminate him, may be disciplined for the good-faith invocation of his Fifth Amendment privilege against self-incrimination.

PARTIES TO THE PROCEEDING

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INTRODUCTION

The decision below merits this Court's review because it heightens a well-developed split in the lower courts on an important and recurring Fifth Amendment issue that affects public employees and employers nationwide, and because it is inconsistent with several decisions of this Court.

This Court has long held that a witness may invoke the Fifth Amendment privilege against self-incrimination whenever he "reasonably believes" that his answers may tend to incriminate him, *Kastigar v. United States*, 406 U.S. 441, 445 (1972), and that the government may not penalize the witness for such an invocation of the privilege, *e.g., Minnesota v. Murphy*, 465 U.S. 420, 429 (1984). The lower courts are deeply divided over how these Fifth Amendment principles are affected by *Garrity v. New Jersey*, 385 U.S. 493 (1967), which held that statements compelled from a public employee by the threat of employment sanctions could not be used to prosecute the employee criminally. In particular, the lower courts are split over the following recurring question: Whether a public employee who invokes the privilege in an administrative investigation—and who has not been informed that his answers may not be used against him in a criminal prosecution—may be disciplined on the ground that *Garrity* "automatically" immunizes his statements and thereby makes invocation of the privilege improper.

In this case, the First Circuit joined the Fifth and Eighth Circuits and the high courts of several States in concluding that such an employee's lack of notice of his *Garrity* immunity is not a bar to penalizing him for invoking his Fifth Amendment rights. On the

other hand, the Second, Sixth, Seventh, D.C., and Federal Circuits, along with the majority of State courts to address the issue, have adopted the view that, absent notice of his entitlement to such immunity, a government employee may *not* be penalized for invoking the privilege.

In addition to exacerbating this deep division in the lower courts, the decision below merits this Court's attention because it is inconsistent with this Court's own decisions. In particular, the decision conflicts with this Court's holding, in *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983), that—in the absence of assurance of immunity *at the time of the testimony*—a witness cannot be deprived of his right to claim the privilege by the mere "predictive judgment" that he will be legally entitled to claim such immunity in a future criminal prosecution. *Id.* at 261. In addition, in holding that petitioner's invocation of the privilege was improper because petitioner's good-faith belief that he was at risk of incrimination was erroneous in light of *Garrity*, the decision conflicts with *Kastigar* and numerous other cases holding that the propriety of invoking the privilege turns on whether a witness *reasonably believes* that he is at risk of incrimination—*not* on whether the belief ultimately turns out to be erroneous.

Furthermore, the question presented is an important Fifth Amendment issue as to which clear guidelines for public employers and employees, and a uniform constitutional rule, are particularly important.

Accordingly, petitioner submits that this Court's review is warranted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 488 F.3d 489 (1st Cir. 2007). The order of the court of appeals denying Petitioner's petition for rehearing and rehearing *en banc* is unreported.

JURISDICTION

The court of appeals issued an order denying Petitioner's timely filed petition for rehearing and rehearing *en banc* on August 3, 2007. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

STATEMENT OF FACTS

Petitioner Alam Sher was Chief of Pharmacy at a Department of Veterans Affairs ("VA") hospital in Gardiner, Maine. On January 29, 2001, the VA initiated an investigation of Mr. Sher's practice of obtaining free Lipitor samples from pharmaceutical companies for personal use, also known as "sampling." VA criminal investigator Timothy Bond referred the matter to the U.S. Attorney's office "for consideration for criminal prosecution." The office verbally declined prosecution on March 7, 2001. Pet. App. 4a-5a.

The VA Chief of Staff subsequently sent a letter to Mr. Sher notifying him that an interview had been scheduled for July 2001, and that "federal regulations require employees to furnish information ... in cases

respecting employment and disciplinary matters, and that refusal ... may be grounds for disciplinary action." *Id.* at 6a (internal quotation marks and alterations omitted). The letter did not, however, indicate that any information provided by Mr. Sher would be protected in any way from use in any subsequent criminal proceedings.

After the VA refused to postpone the interview by two days to permit Mr. Sher's retained counsel, Sumner Lipman, to attend, the interview was set by the VA for July 11, 2001. Mr. Sher was represented at the interview by Lipman's partner Keith Varner, an attorney who does not practice criminal law. Bond, the criminal investigator, was one of the VA personnel in attendance. *Id.* at 6a-7a.

At the interview, Varner "expressed his concern that the interview would expose Sher to criminal liability." *Id.* at 7a. Despite this expression of concern, the VA representatives did not indicate that any statements Mr. Sher made would not be used against him in a criminal prosecution. Instead, the VA took the position that Mr. Sher should be satisfied with a letter faxed from the U.S. Attorney's Office, which stated in its entirety:

> On March 7, 2001, this office declined criminal prosecution of Mr. Sher in favor of administrative action. The conduct for which Mr. Sher was being considered for prosecution was his request and receipt of drug samples (specifically Lipitor) in August of 2000 and January and February of 2001.

Id. However, the dates listed in the letter did not cover all of the dates of Mr. Sher's conduct—omitting, in particular, June 2000 and December 2000—and

the letter made no commitment that the declination of prosecution could not be changed based upon additional evidence that would support criminal charges. *See id.* at 4a.

Lipman, reached by phone, expressed his concern that "the letter still left Mr. Sher at risk of criminal prosecution," and Mr. Sher, on the advice of counsel, declined to answer questions. *Id.* at 7a. At some point after the July 11 interview, VA attorney Carol Moore directed Mr. Sher's attorneys to case law in support of her contention that Mr. Sher was obligated to cooperate in the investigation. Mr. Sher's attorney responded in a July 25, 2001 letter that Mr. Sher would attend an interview and cooperate so long as he received "the same [immunity] language offered from the VA as was provided in both the Weston and Hanna cases" cited by Moore. *Id.* at 159a.[1]

The VA did not schedule another interview, and ultimately sustained administrative charges against Mr. Sher for, "[o]n July 11, 2001 ... refus[ing] to provide information to an agent from the [VA] Inspector General's office," and for soliciting and possessing Lipitor. Pet. App. 111a. The VA imposed a forty-five day suspension and demoted Mr. Sher from

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[1] *See Weston v. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 946 (Fed. Cir. 1983) (employee expressly informed that "[a]ny information or evidence you furnish ... or any information or evidence which is gained by reason of your answer, may not be used against you in criminal proceedings"); *Hanna v. Dep't of Labor*, 18 Fed. Appx. 787, 790 (Fed. Cir. 2001) (employee provided with "a clear and unambiguous statement that nothing [he] said at the interview could be used against him in a criminal proceeding").

his position with a corresponding reduction in pay grade from GS-13 to GS-12. *Id.* at 8a.

On appeal to the Merit Systems Protection Board ("MSPB"), an ALJ sustained the sampling charges but overruled the failure to cooperate charge on the ground that "the concerns of Mr. Sher and his counsel regarding possible prosecution were legitimate." *Id.* However, the MSPB panel reversed the ALJ's dismissal of the failure to cooperate charge, ruling that the U.S. Attorney's Office letter, by stating that that office had "declined criminal prosecution" in March 2001, provided Mr. Sher with sufficient immunity to make his invocation of his Fifth Amendment rights improper and punishable. *Id.* at 112a.

Mr. Sher petitioned the U.S. District Court for the District of Maine for review of the MSPB decision. A magistrate judge recommended upholding the MSPB panel, reasoning that the administrative nature of the investigation and the declination of prosecution provided sufficient protection to Mr. Sher. *Id.* at 68a-107a. The district court adopted the magistrate judge's recommendation. *Id.* at 50a-67a.

On appeal, the First Circuit declined to rely on the U.S. Attorney's letter as sufficient to provide Mr. Sher with immunity, but nonetheless affirmed. *Id.* at 1a-38a. The court held that Mr. Sher was unjustified in invoking the Fifth Amendment privilege, and could accordingly be disciplined for his silence, because immunity under *Garrity* attached automatically when he was ordered to answer questions on pain of possible employment sanctions. *Id.* at 22a. The First Circuit recognized that several Circuits have held

that a government employer may not discipline an employee for invoking his Fifth Amendment privilege when the employer did not notify the employee that his answers could not be used against him in a criminal prosecution. *Id.* at 24a-25a. However, the court declined to adopt such a rule requiring actual notice. Instead, the court held that, because Mr. Sher was represented by counsel, he could be "charged with" notice of "his immunity [under] *Garrity*"—and could therefore be disciplined for invoking the privilege—even in the absence of evidence that Mr. Sher or his counsel was actually aware that any such immunity was applicable. *Id.* at 29a.

Judge Stahl, dissenting, argued that the majority erred in concluding that a government employee may be disciplined for invoking the Fifth Amendment privilege "even where, as here ... he has an objectively reasonable fear that his statements will not in fact be protected by use immunity." *Id.* at 40a. He cited multiple court of appeals decisions holding that actual notice of use immunity is required, and contended that this rule was a necessary one because absent such notice employees would be "discipline[d] when they believe they are simply exercising a basic constitutional right." *Id.* at 43a. Judge Stahl explained that "[w]hile government employees may understand that they have a Fifth Amendment right to remain silent, they may not understand the complex exceptions to that rule under *Garrity*," *id.*, and he added that under his understanding of the law, even "a represented employee who reasonably believes ... that his statements may indeed be used against him, should not be punished for invoking his constitutional right to remain silent," *id.* at 46a n.26.

On August 3, 2007, the First Circuit denied Mr. Sher's petition for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS ARE DIVIDED OVER WHETHER A GOVERNMENT EMPLOYEE, WHO HAS NOT RECEIVED NOTICE THAT HIS ANSWERS IN AN ADMINISTRATIVE INVESTIGATION MAY NOT BE USED TO INCRIMINATE HIM, MAY BE DISCIPLINED FOR HIS GOOD-FAITH INVOCATION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The lower courts are deeply divided over whether a government employee may be penalized for invoking his Fifth Amendment privilege against self-incrimination when he has not received notice that his answers may not be used to incriminate him.

At least five federal courts of appeals—the Second, Sixth, Seventh, District of Columbia, and Federal Circuits—have adopted the view that an employee may not be disciplined for invoking the privilege unless he "is adequately informed ... that his replies (and their fruits) cannot be employed against him in a criminal case." *Kalkines v. United States*, 473 F.2d 1391, 1393 (Ct. Cl. 1973) (invalidating suspension and discharge of Bureau of Customs employee who did not receive such notice). In contrast, the Fifth and Eighth Circuits have joined the First Circuit in holding that an employee's actual notice of his immunity is not required.

On the majority side of the conflict, the Seventh Circuit has consistently held that a government

employee faced with questions about potentially criminal conduct must be notified "that he would be granted immunity from prosecution based on his answers and that a failure to answer would therefore be viewed negatively," *Franklin v. City of Evanston*, 384 F.3d 838, 841 (7th Cir. 2004), and that no "disciplinary action [may] be taken against the witness for his refusal to testify, unless he is first advised that, consistent with the holding in *Garrity*, evidence obtained as a result of his testimony will not be used against him in subsequent criminal proceedings," *United States v. Devitt*, 499 F.2d 135, 141 (7th Cir. 1974).[2] The rule recognizes that in the absence of notice that they are protected by immunity, many employees would "instinctively 'take the Fifth' and by doing so unknowingly set themselves up to be fired without recourse." *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002).

Similarly, the Federal Circuit has consistently adhered to the holding in *Kalkines*, 473 F.2d at 1393-98, that actual notice of *Garrity* immunity is a prerequisite to disciplining an employee for invoking the privilege. *See, e.g., Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344, 1351 (Fed. Cir.

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[2] *Accord Driebel v. City of Milwaukee*, 298 F.3d 622, 638 n.8 (7th Cir. 2002) (employer must "*warn* [the employee] that because of the immunity to which [case law] entitles him, he may not refuse to answer the questions on the ground that the answers may incriminate him.") (internal citation omitted, emphasis and second alteration in the original); *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 (7th Cir. 1973) (discharge of police officers for invoking Fifth Amendment privilege invalid where the officers "were not advised that their answers would not be used against them in criminal proceedings").

2001) (overturning discharge of employee who was given only a letter conveying a "decision to decline prosecution" but no express notice of immunity); *Weston v. U.S. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 948 (Fed Cir. 1983) (under *Garrity*, to compel an employee to answer potentially incriminating questions he must be "duly advised of his options to answer under the immunity granted or remain silent and face dismissal").

The Sixth, D.C., and Second Circuits have likewise recognized, contrary to the First Circuit's decision here, that actual notice is required. *See McKinley v. City of Mansfield*, 404 F.3d 418, 439 n.24 (6th Cir. 2005) (under *Garrity*, "a state employer who compels an employee to make incriminating statements must ... promise not to use those statements in a criminal proceeding against the employee"); *Devine v. Goodstein*, 680 F.2d 243, 246 (D.C. Cir. 1982) (employee may only be "discharged for refusing to testify at an administrative hearing" when he "is informed that his responses and their fruits cannot be employed against him in a criminal case") (citing *Kalkines* and Second Circuit decision in *Uniformed Sanitation*); *Uniformed Sanitation Men Ass'n Inc. v. Comm'r of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970) (Friendly, J.) (employee may be fired for remaining silent only where he is "duly advised of his options and the consequences of his choice").[3]

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[3] The Eleventh Circuit has also suggested that actual notice of *Garrity* immunity is necessary before an employee may be disciplined for refusal to testify. *See Benjamin v. City of Montgomery*, 785 F.2d 959, 962 (11th Cir. 1986) (court cannot "require public employees to speculate whether their statements

The majority of State courts to address the issue have also held that actual notice is required. As the Supreme Court of Wisconsin has put it, the Fifth Amendment requires that "the coercive power of job forfeiture should not be employed unless it is made clear that to speak will not result in criminal prosecution." *Oddsen v. Bd. of Fire & Police Comm'rs*, 321 N.W.2d 161, 164 (Wis. 1982); *accord State v. Brockdorf*, 717 N.W.2d 657, 665 (Wis. 2006) (citing *Oddsen* and Seventh Circuit decision in *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973)); *see also Baglioni v. Chief of Police of Salem*, 656 N.E.2d 1223, 1224-26 (Mass. 1995) (officers must be given assurance of effective immunity before they can be required to answer potentially incriminating questions); *Carney v. City of Springfield*, 532 N.E.2d 631, 635 (Mass. 1988) (overturning discharge of police officer for refusal to answer questions based on failure to affirmatively offer immunity to supplant Fifth Amendment privilege); *Jones v. Franklin County Sheriff*, 555 N.E.2d 940, 945 (Ohio 1990) (upholding discharge on the ground that "[t]he privilege against self-incrimination is preserved because a statement by investigators that nothing said at the hearing can be used at a subsequent criminal proceeding effectively

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will later be excluded under *Garrity*"); *but cf. Hester v. City of Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985) (declining to require city to expressly offer use immunity as part of policy requiring firefighters to take polygraph tests while expressly preserving constitutional rights).

immunizes that testimony from later use by a prosecutor"). Other state high courts have likewise held that actual notice is required.[4]

On the other hand, the Fifth and Eighth Circuits, like the First Circuit, have held that an employee's

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[4] *See Gandy v. State ex rel. Div. of Investigation & Narcotics*, 607 P.2d 581, 583-84 (Nev. 1980) (dismissal of public employee for refusal to take polygraph test permissible only where employee has been informed "that the answers cannot be used against him in any subsequent criminal prosecution, and that the penalty for refusing to answer is dismissal"); *Seattle Police Officers' Guild v. City of Seattle*, 494 P.2d 485, 491 (Wash. 1972) (sanctioning the dismissal of police officers only where they have been "advised that information supplied through their answers could not be used against them in later criminal proceedings, and that their refusal to cooperate in the investigation could result in their dismissal"); *see also Gardner v. Mo. State Highway Patrol Superintendent*, 901 S.W.2d 107, 113 (Mo. Ct. App. 1995), *Mot. for Transfer to Sup. Ct. denied* (Jul. 25, 1995) (government employee may be dismissed for refusing to respond to investigatory questions only when he has been "adequately advised" of his *Garrity* immunity); *Banca v. Town of Phillipsburg*, 436 A.2d 944, 948 (N.J. Super. Ct. App. Div. 1981) ("[Police officer] was required to have been clearly, unambiguously and expressly advised of his use immunity at the outset as a prerequisite to the subsequent imposition of a disciplinary sanction for refusal to make a statement."); *Eshelman v. Blubaum*, 560 P.2d 1283, 1285-86 (Ariz. Ct. App. 1977) (police officer must be informed of his *Garrity* immunity before he may be forced to undergo a polygraph test or face dismissal); *In re Waterman*, 910 A.2d 1175, 1178-80 (N.H. 2006) (citing *Eshelman* and relying on the giving of a "*Garrity* Warning" as basis for upholding termination of state trooper for refusal to take polygraph test); *Avant v. Clifford*, 341 A.2d 629, 655-56 (N.J. 1975) (citing *Kalkines* and *Uniformed Sanitation* and holding that in prison disciplinary proceedings prisoner and his counsel "must be advised" of prisoner's entitlement to use immunity).

actual notice of his immunity is not required. The Eighth Circuit, in *Hill v. Johnson*, 160 F.3d 469 (8th Cir. 1998), held that the discharge of a sheriff's deputy for refusal to answer questions was constitutionally permissible even where the employee was not "told that his answers ... could not be used against him in [a] criminal prosecution." *Id.* at 471. The Court reasoned that "the mere failure affirmatively to offer immunity is not an impermissible attempt to compel a waiver of immunity," and that it is only the latter that the Constitution prohibits. *Id.* Likewise, the Fifth Circuit, in *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982), upheld the discharge of public employees who invoked their Fifth Amendment privilege and refused to take a polygraph exam. Rejecting the employees' contention that they should have been informed that their responses would be protected by use immunity, the Fifth Circuit expressly rejected the decisions of other Circuits requiring an "affirmative tender of immunity to an employee." *Id.* at 1074. Rather, the court held, the Constitution requires only that an employer not affirmatively "demand ... the *waiver* of [the] immunity" automatically conferred by *Garrity*. *Id.* at 1074-75 (emphasis added).

Several State high courts have adopted the same view that actual notice of immunity is not a prerequisite to disciplining a public employee for invoking the Fifth Amendment privilege in an administrative investigation. *See, e.g., Debnam v. North Carolina Department of Correction*, 432 S.E.2d 324, 330 (N.C. 1993) (citing *Gulden* and holding "that a government employer is not required to affirmatively inform an employee of the law relating

to use immunity before discharging that employee for refusal to answer questions which may incriminate him"); *Matter of Matt v. Larocca*, 518 N.E.2d 1172, 1176 (N.Y. 1987) (upholding discharge of public employee who invoked Fifth Amendment privilege, on ground that "the State was not obligated to inform petitioner that immunity attached before ordering him to answer questions"); *State Dep't of Corr. Servs. v. Gallagher*, 334 N.W.2d 458, 462 (Neb. 1983) (upholding dismissal of parole officer based on reasoning of *Gulden*); *see also Lybarger v. City of Los Angeles*, 710 P.2d 329 (Cal. 1985) (requiring actual notice of immunity as a state statutory requirement but opining in *dicta* that under federal Constitution police officer could be disciplined for his silence even absent such notice).

In short, the First Circuit's decision upholding the imposition of discipline, in the absence of actual notice to petitioner of his immunity, for petitioner's invocation of the privilege exacerbates a deep division of authority over this important Fifth Amendment issue.

II. THE FIRST CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S CASES

This Court should also grant review because the First Circuit's decision is inconsistent with this Court's cases in at least two key ways.

First, the decision below is premised on the view that Mr. Sher (or his counsel) should have recognized (based on the VA's threats of disciplinary action for failure to cooperate) that any statement Mr. Sher made would be protected by *Garrity* immunity in any subsequent criminal prosecution, and that

accordingly Mr. Sher "had no basis under the Fifth Amendment for refusing to answer the VA's questions." Pet. App. 23a. This notion—that a witness loses his Fifth Amendment right to invoke the privilege if it can be predicted that he will be immune in a subsequent criminal prosecution—is squarely contrary to this Court's case law.

In *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1982), this Court held that *even a federal judge's prediction* that the witness would be entitled to immunity in a subsequent prosecution does not deprive the witness of the right to invoke the privilege. In *Pillsbury*, John Conboy was granted use immunity for certain grand jury testimony, and was later asked questions in a civil deposition drawn from the transcript of the immunized testimony. *Id.* at 250-51. Conboy asserted his Fifth Amendment rights, and the district court ordered him to answer—ultimately holding him in contempt for refusing—based on its conclusion that the answers were protected by the grant of immunity and its "predict[ion] that a court in any future criminal prosecution ... will be obligated to protect against evidentiary use of the deposition testimony." *Id.* at 261. This Court held that "such a predictive judgment" about the witness' entitlement to immunity cannot override the witness' right to invoke the privilege. *Id.* Rather, the witness must "receive[] the *certain* protection of his Fifth Amendment privilege," and therefore may not be compelled to testify "over a valid assertion of [the] ...privilege" unless he receives "*assurance* of immunity *at the time*." *Id.* at 261, 263 (emphasis added). The First Circuit's holding in this case that the ability to predict the applicability of *Garrity* immunity is

sufficient to deprive an employee of his right to claim the protection of the Fifth Amendment is flatly inconsistent with *Pillsbury*.

Nor is *Pillsbury* alone in establishing that a witness must be *assured* of his immunity before he loses the right to remain silent in reliance on the privilege. This Court has repeatedly recognized—including in the *Garrity* line of cases—that one who asserts the privilege "'may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him' in a subsequent criminal proceeding." *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (emphasis in original) (quoting *Maness v. Meyers*, 419 U.S. 449, 473 (1975) (White, J., concurring in result)); *see also Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973) ("[A] witness protected by the privilege may rightfully refuse to answer *unless and until he is protected* at least against the use of his compelled answers . . . .") (emphasis added); *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976) (individual compelled to testify "must be *offered* whatever immunity is required to supplant the privilege") (emphasis added; internal citation omitted).[5]

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[5] Indeed, in *Gardner v. Broderick*, 392 U.S. 273 (1968), this Court held that a police officer could not be discharged for refusing to waive his Fifth Amendment rights, and expressly declined to address whether *Garrity* would have protected him despite the waiver. *See id.* at 278-79 ("We need not speculate whether, if appellant had executed the waiver of immunity . . . the effect of . . . [*Garrity*] would have been to nullify the effect of the waiver."). The Court reasoned that "[p]etitioner could not have assumed—*and was not required to assume*—[that signing

In short, this Court's cases establish that a witness is entitled to invoke his Fifth Amendment privilege unless and until he is assured that his answers cannot be used in a criminal prosecution. The First Circuit's holding that a public employee is deprived of the right to invoke the privilege in the absence of such assurance—so long as threats of disciplinary action would allow a lawyer to conclude that *Garrity* immunity should apply—relies on precisely the type of "predictive judgment" this Court's cases have ruled out as a basis for overriding the privilege.

Second, the First Circuit's holding conflicts with the fundamental principle that "the Fifth Amendment privilege against compulsory self-incrimination 'protects against any disclosures that the witness *reasonably believes* could be used in a criminal prosecution or could lead to other evidence that might be so used.'" *Hiibel v. Sixth Jud. Dist. Court*, 542 U.S. 177, 190 (2004) (emphasis added) (quoting *Kastigar v. United States*, 406 U.S. 441, 445 (1972)). Under this well-established framework, the relevant question before the First Circuit was simply whether Mr. Sher's good-faith belief (based on the advice of counsel) that he risked self-incrimination could be termed *unreasonable* when neither he nor his counsel was given actual notice that his statements were protected. The First Circuit and other courts that have deemed actual notice unnecessary have universally failed to recognize that

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the waiver was] an idle act of no legal effect." *Id.* at 279 (emphasis added).

the issue, under *Kastigar*, is *not* simply whether *Garrity* eliminates the employee's risk of self-incrimination, but rather whether *Garrity* renders the employee's *belief* that he risks self-incrimination unreasonable.

Had the First Circuit properly analyzed the Fifth Amendment issue under the "reasonable belief" framework, it would have been hard-pressed to conclude that Mr. Sher could have *no* reasonable fear of self-incrimination. Both Mr. Sher and his counsel were clearly unaware, at the July 11, 2001 interview, of even the possibility that *Garrity* immunity applied.[6] The VA personnel at the interview also appeared unaware—indeed, the VA letter scheduling the interview appeared to reflect a view that no such immunity was necessary because the VA had deemed the investigation "administrative" rather than "criminal." Furthermore, even if Mr. Sher's attorney had been thoroughly familiar with *Garrity*, the First Circuit would have had to recognize that such an attorney could not have been certain, absent an

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[6] The First Circuit noted that Mr. Sher's attorney was subsequently referred to case law that described *Garrity* immunity. Pet. App. 30a-31a. However, Mr. Sher was disciplined for refusing to answer questions *on July 11*, making any subsequent knowledge of *Garrity* irrelevant. Indeed, the ALJ found that Mr. Sher's attorney made clear, upon being referred to these cases, that Mr. Sher would answer questions so long as the VA offered "the same [immunity] language ... as was provided" in those cases, *see* n.1, *supra*, yet the VA chose not to schedule another interview and instead disciplined Mr. Sher for invoking the privilege on July 11, Pet. App. 159a.

affirmative statement by the VA, that Mr. Sher's statements would be protected.[7]

In short, the First Circuit's holding that an employee may be deprived of his right to invoke the Fifth Amendment privilege in the absence of actual notice that his statements may not be used to incriminate him conflicts with this Court's cases establishing a witness' right to invoke the privilege so long as he "reasonably believes" his answers place him at risk of self-incrimination.

III. THE ISSUE IN CONFLICT IS WELL PRESENTED BY THIS CASE

This case presents the Fifth Amendment notice issue on which the lower courts are divided in the context of a well-developed factual record, and of thoroughly-reasoned majority and dissenting opinions in the First Circuit; and the court below upheld the VA's demotion of petitioner based solely on its resolution of the issue in conflict.

In addition, the fact that petitioner was represented by counsel at the time he invoked the privilege presents the conflict in the lower courts

[7] Among other things, prior First Circuit cases indicated that *Garrity* immunity could be triggered only by an express threat of *dismissal* from employment, *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980), and that where the employer had no rule "*mandating* that claiming [one's] constitutional right to remain silent must necessarily result in [dismissal]," testimony would not be protected by *Garrity*, *United States v. Stein*, 233 F.3d 6, 17 (1st Cir. 2000) (emphasis added). Here, Mr. Sher was told that "[r]efusal to testify ... may be ground for disciplinary action," Pet. App. 22a—not that refusal would *necessarily* result in *dismissal*—and, as a result, a fear that *Garrity* would be held inapplicable would clearly have been reasonable.

more fully than would a case involving an unrepresented employee. The employee's representation by counsel is a common feature in cases addressing this issue,[8] and the presence of that feature in this case will allow this Court to resolve not only the question whether notice of *Garrity* immunity is required, but also whether that obligation may be satisfied, for a represented employee, by something other than actual notice.

To be sure, it is unlikely that this Court will find an employee's representation by counsel calls for a different notice rule—other than the instant case, the cases have almost uniformly treated such representation as irrelevant to the proper determination of the notice issue. But even a determination that the presence of counsel does not affect the notice required will resolve a point that, as noted, is present in this case and a high percentage of the other cases at issue.

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[8] *See, e.g., Kalkines*, 473 F.2d at 1396 (expressly rejecting argument that employee's representation by counsel should affect extent of notice required); *Carney*, 532 N.E.2d at 634 (noting that refusal to answer was based on advice of counsel); *Jones*, 555 N.E.2d at 942 (same); *Banca*, 436 A.2d at 946 (same); *Gallagher*, 334 N.W.2d at 460 (same); *Matt*, 518 N.E.2d at 1173 (same); *Gardner*, 901 S.W.2d at 110 (noting that refusal to take polygraph was based on advice of counsel); *Gandy*, 607 P.2d at 583 (same).

IV. THE QUESTION PRESENTED IS AN IMPORTANT FIFTH AMENDMENT ISSUE THAT REQUIRES THIS COURT'S RESOLUTION

Review by the Court is also warranted because the question presented is an important and recurring Fifth Amendment issue, affecting public employees nationwide, as to which there should be a uniform constitutional rule. The lower courts are badly divided on the issue even after full percolation, however, and only review by this Court can resolve this severe and growing conflict.

Reflecting this continuing confusion in the lower courts, the California Supreme Court only recently granted review to address what (if any) conferral of immunity this Court's cases require before a public employee may be disciplined for invoking the privilege. *See Spielbauer v. County of Santa Clara*,, 146 Cal. App. 4th 914 (Cal. Ct. App. 2007), *vacated and review granted*, 159 P.3d 29 (Cal. 2007); *see generally* Comment, Matthew Bernt, *Should Public Employers Be Forced To Warn Their Employees Of Their Immunity And Duty To Answer Questions Before Demanding Answers And Taking Adverse Action?*, 56 CATH. U. L. REV. 1037 (2007).

It goes without saying, moreover, that the right at issue here—the Fifth Amendment privilege against self-incrimination—is of paramount importance, and, as Judge Stahl pointed out below, Pet. App. 44a, uncertainty as to the circumstances in which the privilege may be invoked is particularly harmful. Clarity on this issue is also important for public employers, which require clear guidance as to the

extent of their notice obligations and the circumstances in which employees may be disciplined for invoking the privilege.[9]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 1, 2007

[9] Among other things, such employers are potentially subject to § 1983 claims by employees based on failure to satisfy these obligations. *See, e.g., Franklin*, 384 F.3d at 841.

APPENDIX

United States Court of Appeals,First Circuit.

Alam SHER, Plaintiff, Appellant,
v.
U.S. DEPARTMENT OF VETERANS AFFAIRS,
Defendant, Appellee.
No. 06-1537.

Heard Oct. 6, 2006.
Decided May 29, 2007.

Rehearing and Rehearing En Banc Denied Aug. 3, 2007.

Before LIPEZ, Circuit Judge, STAHL, Senior Circuit Judge, and HOWARD, Circuit Judge.

LIPEZ, Circuit Judge.

This case requires us to examine the implications of the immunity that a government employee receives under *Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), when threatened with an adverse employment action for refusing to answer questions in an administrative investigation by his employer. Statements made in response to such a threat, and the fruits of such statements, may not be used against the employee in subsequent criminal proceedings. That much is clear. The question we consider is whether the circumstances present in this case justified a failure to cooperate charge brought against appellant Dr. Alam Sher by appellee, the Department of Veterans Affairs ("VA"), for Sher's refusal to answer questions as part of an investigation into his conduct by the VA.

Sher was Chief Pharmacist of a hospital operated by the VA in Gardiner, Maine. In 2001, the VA suspended Sher for forty-five days and demoted him from his position with a corresponding reduction in pay grade for obtaining free samples from pharmaceutical companies for personal use, in violation of 5 C.F.R. § 2635, and failing to cooperate with an administrative investigation, in violation of 38 C.F.R. § 0.735-12(b). After an initial reversal of the failure to cooperate charge by an Administrative Law Judge ("ALJ"), the Merit Systems Protection Board ("MSPB") issued a final order upholding the VA's decision. Sher subsequently filed suit in federal district court challenging the MSPB decision to sustain the failure to cooperate charge and the penalty imposed by the VA. He also brought a claim of employment discrimination on the basis of religion and national origin against the VA under Title VII, 42 U.S.C. § 2000e-2. Additionally, he moved to amend the record to include a VA training videotape that discusses the practice of obtaining free drug samples. The district court denied the motion to amend the record, upheld the MSPB's decision, and granted summary judgment to the VA on the employment discrimination claim. We affirm the judgment of the district court.

I.

A. Factual Background

We draw the following facts from the administrative record and the parties' affidavits. We note factual disputes where they exist but find that these disputes do not affect our disposition of the case.

Sher is a Muslim of Pakistani origin. He worked as Chief Pharmacist for the Togus Medical Center, located in Gardiner, Maine and operated by the VA, from 1992 until 2001. He received high evaluations during his tenure as Chief Pharmacist. It is uncontested that Togus Director John Sims knew of Sher's Pakistani origin, but the parties disagree as to whether Sims and Togus Chief of Staff Timothy Richardson knew of Sher's Muslim faith.

Federal regulations prohibit federal employees from accepting items of monetary value from anyone doing business with the employee's agency, subject to limited exceptions. *See* 5 C.F.R. §§ 2635.201-.203. The VA also promulgates its own agency-specific regulations, and individual units of the VA develop their own local policies. In August 1999, Togus instituted a facility-wide policy prohibiting "sampling," a practice in which representatives of pharmaceutical companies give providers free samples of their medicines to facilitate better understanding of the medicines' application and efficacy. Although the parties agree that Sher had notice of this policy, Sher states that he believed that the policy applied only to the distribution of samples to patients or veterans. Many medical professionals at Togus shared his belief.

In August 2000, Sher attended a training on standards of ethical conduct for government employees. At that training, he received a pamphlet entitled "An Ethics Pamphlet for Executive Branch Employees," which explained the federal gift ban with the statement that "[a]n employee shall not, except as permitted by the Standards of Ethical Conduct, solicit or accept any gift or other item of

monetary value from any person ... doing business with ... the employee's agency." The pamphlet also noted that "you may not accept a gift from people or organizations who are 'prohibited sources'-those who do business with, or seek to do business with your agency." Employees could "accept any gift that is not worth more than $20," but could not "ask for [ ] something worth $20 or less."

Throughout the proceedings leading to this litigation, Sher has stipulated that, after experiencing chest pain and consulting a cardiologist, he requested and received free samples of Lipitor several times while employed as Chief Pharmacist at Togus. On or about June 16, 2000, in order to participate in a Parke-Davis promotional program, Sher signed a Free Goods Requisition Form for Lipitor. He signed another such form on August 16, 2000. In December 2000, Sher asked a Pfizer sales representative for samples of Lipitor, and repeated his request after a "lunch and learn" program in mid-January of 2001. On about January 25, Sher asked another Pfizer representative for samples of Lipitor and signed a "starter activity form" in order to receive the Lipitor. Two days later, a Pfizer sales representative provided Sher with thirty-two ten-milligram samples of Lipitor, a fifty-six day supply. On about January 29, another sales representative provided Sher with more samples of Lipitor.

On January 29, 2001, a Togus employee informed Chief of Human Resources James Schillinger and VA counsel Carole Moore that Sher had accepted drugs from a pharmaceutical representative. That same day, at the request of Schillinger and Moore, Togus security officers

stopped Sher as he was leaving the medical center. The officers searched Sher's briefcase and office, finding 672 ten-milligram samples of Lipitor.

The VA initiated an investigation of Sher's activities related to sampling. Under 38 C.F.R. § 0.735-12(b), federal employees must furnish information with respect to employment and disciplinary matters unless to do so would be self-incriminating. On February 1, VA Investigator Timothy Bond interviewed Sher, who admitted receiving free samples of Lipitor from Pfizer sales representatives. Having retained attorney Sumner Lipman to represent him, Sher attempted, unsuccessfully, to contact Lipman by phone during the interview. The parties dispute the events that took place at this interview. Sher asserts that, although he agreed to participate in the interview, he did so only because Bond gave him no choice. For its part, the VA contends that Bond informed Sher of his rights under *Garrity,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562,[1] at the meeting, and that Sher subsequently consented to the interview.

Bond presented the case against Sher to the United States Attorney's Office for the District of Maine for consideration for criminal prosecution. On March 7, the U.S. Attorney's Office verbally declined prosecution.

On June 5, Bond again attempted to interview Sher without Lipman present. The parties agree that

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[1] We will discuss *Garrity* and its progeny in section IV.B, *infra.*

Sher unsuccessfully tried to reach Lipman by phone during the interview, but the record offers no other information about the events that took place at this interview.

In a letter dated June 28, 2001, Togus Chief of Staff Timothy Richardson notified Sher that an administrative interview had been scheduled for July 10. The letter informed Sher that "the United States Attorney of the District of Maine has declined criminal prosecution in the matter before the Inspector General," that "the matter is therefore an administrative investigation," that he was "entitled to the representative of his choice," that federal regulations require employees to "furnish information ... in cases respecting employment and disciplinary matters," and that "[r]efusal ... may be ground for disciplinary action."

By letter dated July 2, Sher asked to reschedule the interview because he had planned to be on vacation until July 11 and his attorney, Sumner Lipman, was unavailable until July 15. Acting on behalf of Togus Director John Sims, Schillinger rescheduled the interview for July 11, thereby effectively refusing Sher's request to have his preferred representative present. The letter rescheduling the interview, dated July 2, reiterated that the U.S. Attorney's Office had declined criminal prosecution, that the issue was now an administrative matter, that Sher was obliged by regulation to provide information, and that he could be disciplined if he refused.

On July 11, Sher appeared with attorney Keith Varner, a partner of Lipman, for the interview with

Investigator Bond. VA Counsel Moore also attended the meeting. Varner requested that they postpone the interview until July 13 to allow Lipman to attend.[2] Moore refused the request. Varner also expressed his concern that the interview would expose Sher to criminal liability. In an attempt to address this concern, Moore obtained, by fax, a letter from the U.S. Attorney's Office for the District of Maine declining prosecution. The letter from First Assistant United States Attorney William H. Browder stated, in its entirety:

> On March 7, 2001, this office declined criminal prosecution of Mr. Sher in favor of administrative action. The conduct for which Mr. Sher was being considered for prosecution was his request and receipt of drug samples (specifically Lipitor) in August of 2000 and January and February of 2001.

After reviewing this fax, Varner consulted with Lipman by phone. Lipman was concerned that the letter still left Sher at risk of criminal prosecution, and Sher ultimately declined to be interviewed.

As the result of its investigation, the VA subsequently sustained administrative charges against Sher for soliciting Lipitor on five occasions between June 2000 and January 2001 and for

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[2] Although Lipman originally planned to be out of town until July 15, he later offered to cut short his vacation to attend a July 13 interview.

receiving and possessing 672 individual samples of Lipitor on January 29, 2001, all in violation of 5 C.F.R. § 2635. The VA also sustained a charge of failure to cooperate with an administrative investigation, in violation of 38 U.S.C. § 0.735-12. As punishment for these violations, Sims imposed a forty-five day suspension and demoted Sher from his position as Chief Pharmacist, with a corresponding reduction in pay grade from GS-13 to GS-12.

B. Administrative Proceedings

Sher appealed the VA's decision to the MSPB and raised the affirmative defense of discrimination based on national origin and religion. As part of the MSPB review process, an ALJ initially heard Sher's case and sustained the charges relating to Sher's sampling of pharmaceuticals, but overruled the failure to cooperate charges on the ground that the concerns of Sher and his counsel regarding possible prosecution were legitimate. The ALJ also rejected Sher's affirmative defenses of national origin and religious discrimination. Finally, the ALJ held that the agency's penalty was unreasonable given the factors identified in *Douglas v. Veterans Administration,* 5 MSPB 313, 5 M.S.P.R. 280 (1981).[3]

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[3] The *Douglas* factors include: "(1) the nature and seriousness of the offense ...; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5)

The parties cross-appealed the ALJ's decision. An MSPB panel sustained the ALJ decision on the sampling charges and Sher's defense of discrimination, but overruled the ALJ's decision on the failure to cooperate charge and the penalty imposed. The MSPB panel indicated that the letter from the U.S. Attorney's office "was sufficient to provide the appellant with 'use' immunity from prosecution" and found it significant that the letter came directly from the U.S. Attorney's Office. The

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the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense ...; (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others." 5 M.S.P.R. at 306. After discussing these factors, the ALJ summarized his reasons for finding the VA's penalty unreasonable: "I find that the appellant's offenses were not intentional but were technical, that he never knew that requesting/receiving the Lipitor samples was wrong, and that his offenses were not serious due to the non-gift-like qualities of drug samples received from pharmaceutical representatives." The ALJ also noted that Sher "has no past disciplinary record and excellent long-term prior performance and job dedication."

MSPB panel also considered it significant that Sher retained Lipman in February 2001, that Sher was represented by Varner in person, and that Lipman was accessible by phone during the July 11 interview.

C. District Court

On October 19, 2004, Sher filed suit in federal court challenging the MSPB decision on both the failure to cooperate charge and the reasonableness of the penalty. He also alleged that the VA discriminated against him based on national origin and religion in violation of Title VII. Sher subsequently filed a motion to amend the administrative record to include a training videotape that discussed sampling.

The district court denied the motion to amend the record on the ground that Sher had not made the required showing of bad faith or improper behavior. The court then affirmed the MSPB decision in all respects, adopting, in large measure, a Recommended Decision by the magistrate judge. The court found no abuse of discretion in the VA's decision to discipline Sher for his refusal to participate in the interview because Sher received multiple assurances that he would not be prosecuted and was represented by Varner in person and Lipman by phone. The court also granted summary judgment to the VA on the Title VII claim on the ground that Sher failed to demonstrate that the VA's stated reasons for disciplining him were pretext for discrimination. The district court affirmed the penalty imposed by the VA without explicitly discussing it.

On appeal, Sher challenges the court's ruling on the videotape, the affirmance of the MSPB

decision on the failure to cooperate charge and penalty, and the rejection of his Title VII claim.

II.

Sher claims that the district court erred in refusing to amend the administrative record to include a VA videotape entitled "Employee Integrity and Pharmacy Security." We review this claim at the outset because our resolution of the issue determines the content of the administrative record that we review in evaluating Sher's other claims.

The videotape came to Sher's attention in March 2005 when it was played at a monthly staff meeting of the Togus Pharmacy Service; it apparently had been used for ethical training as early as 1994. The video depicts with approval a chief of pharmacy encouraging a doctor to call a drug manufacturer to obtain free samples of medications.

In our review of an administrative decision, "the focal point ... should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). The reviewing court " 'may' (although it is not required to) supplement the record where there is [ ] 'a strong showing of bad faith or improper behavior' by agency decision makers." *Olsen v. United States*, 414 F.3d 144, 155 (1st Cir. 2005) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)). Thus, the question of whether there is bad faith or improper behavior is a factual question, on which we review

the district court's determination for clear error, *Charles v. Rice*, 28 F.3d 1312, 1317 (1st Cir. 1994). If the district court has properly found such behavior, *Olsen*'s statement that the district court may, but is not required to, open the record indicates that we should review its decision for abuse of discretion.

Here, the district court denied Sher's motion to amend the record on the ground that he had presented no evidence of bad faith or improper behavior.[4] It held that the videotape was cumulative of other evidence demonstrating that the practice of sampling was commonplace at the VA. It also emphasized that the videotape's implied approval of sampling cannot supersede the federal regulatory prohibition on such activity.

[4] After the magistrate judge recommended denial of Sher's motion to amend the record, Sher petitioned the MSPB to reopen the administrative record to allow the videotape. The MSPB declined to hear the petition, stating that the Board's regulations do not provide for requests for reconsideration of its final decision. Sher then filed a "Motion to Reconsider Motion to Amend the Record and for Relief," as well as an objection to the Recommended Decision of the magistrate judge. He argued that, because the MSPB declined jurisdiction, the district court assumed exclusive jurisdiction to amend the record. In its review, the district court alternately considered Sher's motion as: (1) a motion for judicial review of a MSPB denial of a motion for reconsideration; (2) a motion for judicial review of a MSPB refusal to reopen the record; (3) a motion for the district court to reopen the record. The court found that, however the issue is conceived, Sher failed to demonstrate that the record should be reopened. On appeal, Sher pursues only the third alternative, requesting that we reverse the district court's decision and grant his motion to amend the record.

On appeal, Sher contends that the court erred in finding no bad faith in the VA's failure to turn over the videotape in response to an Acknowledgment Order from the ALJ seeking "all other documents which are relevant and material to this appeal." He also renews his argument that the videotape establishes VA approval of sampling. The VA counters that there is no evidence that the VA withheld the videotape in bad faith, the tape is not an authoritative statement of VA policy, and the tape duplicates other evidence in the record.

We find no clear error in the district court's conclusion that there was no bad faith. Sher offers no further evidence that the tape was withheld intentionally or for any improper reason. Indeed, the videotape came to light when Sher's successor played it for training purposes, undermining any suggestion that his superiors sought to conceal the tape.

Moreover, the videotape would have had little probative value if admitted. Sher already had introduced testimony from his coworkers to demonstrate the unofficial understanding that sampling was allowed. While the videotape might have suggested that the VA-at some time-had endorsed that understanding, the tape could not, as the district court recognized, preempt the regulation's ban on sampling. Thus, the district court did not err in denying Sher's motion to amend the record.

III.

Determining the framework applicable to our review of Sher's challenge to the failure to cooperate charge, including his affirmative defense of discrimination, is a matter of some complexity. For

the sake of clarity, we will first describe the district court's review of the MSPB decision. The Administrative Procedure Act ("APA") explicitly provides that a claim of discrimination on the basis of race, color, religion, sex, or national origin is an affirmative defense to any adverse personnel action taken by an agency. *See* 5 U.S.C. §§ 2302(b), 7701(c)(2). Although a petition to review a final order of the MSPB usually is filed in the Federal Circuit, *see* 5 U.S.C. § 7703(b)(1), that procedure changes when an employee raises a discrimination claim before the MSPB-even as an affirmative defense. The APA provides that discrimination claims shall be filed under Title VII, *see* 5 U.S.C. § 7703(b)(2), and an affirmative defense of discrimination raised under § 7701(c)(2) therefore is properly appealed to the district court as a Title VII claim. *See* 29 C.F.R. § 1614.310(b); *Kelliher v. Veneman,* 313 F.3d 1270, 1274 (11th Cir. 2002). In "mixed" cases where discrimination claims as well as claims not based on discrimination were presented before the MSPB, the district court has jurisdiction to review both types of claims. *Kelliher,* 313 F.3d at 1274.

The discrimination and non-discrimination claims are subject to distinct standards of review. For the discrimination claim, "the facts [are] subject to trial de novo by the reviewing court." 5 U.S.C. § 703(c). The non-discrimination claims, however, remain subject to the usual standard of review for administrative decisions, and are set aside if the MSPB decision was "(1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence." 5 U.S.C. § 703(c). Thus, "where the MSPB decides a case combining both discrimination and non-discrimination claims, the district court takes jurisdiction over appeals from both determinations, but reviews the non-discrimination claims on the [administrative] record." *Barnes v. Small,* 840 F.2d 972, 979 (D.C. Cir. 1988); *see also Williams v. Dep't of Army,* 715 F.2d 1485, 1491 (Fed. Cir. 1983)(en banc).

Here, the district court reviewed Sher's claims using this framework and granted summary judgment for the VA on all claims. Although we now review the district court's decision to grant summary judgment *de novo,* we apply that standard in a differentiated fashion. With respect to the non-discrimination claims, we review the administrative record directly, applying the same standard of review to that record that the district court applied. *See Crawford v. Runyon,* 37 F.3d 1338, 1340 (8th Cir. 1994). With respect to the discrimination claim, we review the decision of the district court directly. *See id.* With this framework in mind, we turn first to Sher's challenge to the failure to cooperate charge.

IV.

As the result of his refusal to answer questions on July 11, 2001, the VA charged Sher with failure to cooperate with its investigation into his alleged improper sampling in violation of 38 C.F.R. § 0.735-

12(b).[5] The VA contends that Sher had no legal basis for his refusal to cooperate. It notes that Sher was represented by Varner at the interview and had access to his first choice counsel, Lipman, by phone. The VA also emphasizes that it informed Sher and his attorneys orally and in writing that criminal prosecution had been declined and that the investigation was purely administrative. Sher argues that he had legitimate reasons for refusing to answer questions because the letter stated only that the U.S. Attorney had declined to prosecute as of a certain date, not that it conferred immunity; the dates in the letter did not match the dates that he sought Lipitor; and the VA did not reschedule the interview so that Lipman could be present. The question before us, therefore, is whether the MSPB was arbitrary and capricious in upholding the failure to cooperate charge on the ground that Sher had no legal basis for refusing to answer the questions posed to him.

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[5] 38 C.F.R. § 0.735-12(b) states: "Employees will furnish information and testify freely and honestly in cases respecting employment and disciplinary matters. Refusal to testify, concealment of material facts, or willfully inaccurate testimony in connection with an investigation or hearing may be ground for disciplinary action. An employee, however, will not be required to give testimony against himself or herself in any matter in which there is indication that he or she may be or is involved in a violation of law wherein there is a possibility of self-incrimination."

A. Effect of Successive Decisions

In addition to the arbitrary and capricious review we ordinarily apply to decisions of the MSPB, we have in this instance another layer of review to consider due to the differences between the MSPB decision and the ALJ decision that preceded it.[6] Under the APA and its regulations, the MSPB generally "is free to substitute its judgment" for that of the ALJ. *Connolly v. U.S. Dep't of Justice*, 766 F.2d 507, 512 (1985). However, the MSPB must give deference to the ALJ on any issues of credibility, *see id.*, and is "not free to overturn an [ALJ's] demeanor-based credibility findings merely because it disagrees with those findings," *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1299 (Fed. Cir. 2002).

Here, the ALJ overruled the agency's finding that Sher failed to cooperate with the investigation into his sampling. The MSPB then reversed the ALJ's decision. If the ALJ's decision rested on credibility determinations, we would need to consider whether the MSPB gave it due deference.

Such review is unnecessary, however, because any credibility determinations by the ALJ were not

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[6] The MSPB has the authority to refer cases to an ALJ. *See* 5 U.S.C. § 7701(b). However, the ALJ's decision is merely "an initial decision," 5 C.F.R. § 1201.111, which becomes final unless it is reopened or reconsidered on motion of the parties or by motion of the board itself, *see id.* § 1201.113. Where a case is reviewed or reopened, the MSPB may "affirm, reverse, remand, modify, or vacate the decision of the judge, in whole or in part." *Id.* § 1201.117(b).

dispositive of the failure to cooperate charge. The ALJ acknowledged that "[a]lthough there are slight differences in [the accounts provided by Moore, Bond, and Varner], essentially what happened is not in dispute." Moreover, as we will discuss in more detail below, the failure to cooperate charge raises the legal question of whether Sher had adequate notice of his immunity under *Garrity, see infra* Section IV.C. The subjective mental states of Sher and his attorneys are irrelevant to that legal question. [7]

Thus, we need not consider whether the MSPB gave due deference to the ALJ's credibility determinations as we apply arbitrary and capricious review to the MSPB decision on the failure to cooperate charge. In applying this review, the question is not how this court would rule *de novo,* but rather whether the administrative determination is supported by substantial evidence in the record as a whole. *Hayes v. Dep't of the Navy,* 727 F.2d 1535, 1537 (Fed. Cir. 1984).

B. Immunity Under *Garrity*

In *Garrity v. New Jersey,* 385 U.S. 493, 499, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), the Supreme Court

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[7] Thus, we owe no deference to the ALJ's statements that "legitimate concerns surfaced, dominating the appellant's view of the situation and causing him to refuse to answer Bond's questions" and that "Lipman, credibly, had a real concern about" the scope of the grant of immunity. Although such statements arguably entail credibility determinations by the ALJ, they have no bearing on our disposition of the legal question of whether Sher had notice of his immunity.

considered whether the government "can use the threat of discharge to secure incriminatory evidence against an employee." *Garrity* involved an investigation by the Attorney General of New Jersey into alleged irregularities in the handling of cases in which the appellant police officers were told that if they did not answer questions, they would be subject to removal from office. *Id.* at 494, 87 S.Ct. 616.[8] After the police officers answered the questions, their statements were used in a subsequent prosecution against them. *Id.* at 495, 87 S.Ct. 616. After noting that "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent,"*id.* at 497, 87 S.Ct. 616, the Court held unconstitutional the "use in subsequent criminal proceedings of statements obtained under threat of removal from office," *id.* at 500, 87 S.Ct. 616.

Subsequently, the Court held that *Garrity*'s prohibition on the use of statements made under threat of adverse employment action also means that if an employee

> refuse[s] to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive

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[8] Although *Garrity* involved an investigation by a state attorney general, the constitutional prohibition on compulsory self-incrimination also applies to statements made in an administrative investigation. *See Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

> his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not [be] a bar to his dismissal.

Gardner v. Broderick, 392 U.S. 273, 278, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968) (internal footnote and citation omitted). Thus, together, *Garrity* and *Gardner* stand for the proposition that a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer receives immunity from the use of her statements or their fruits in subsequent criminal proceedings, and, consequently, may be subject to such an adverse employment action for remaining silent.[9] Importantly, the employee is not guaranteed transactional immunity. Rather, "the United States is prohibited from using the testimony or its fruits, and ... this degree of prohibition is enough." *Uniformed Sanitation Men v. Comm'r of Sanitation*, 426 F.2d 619, 624 n. 2 (2d Cir. 1970).[10]

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[9] Some courts have referred to this proposition as the "*Garrity* rule." *See, e.g., Weston v. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983).

[10] The Supreme Court has distinguished transactional immunity, which "accords full immunity from prosecution for the offense to which the compelled testimony relates," from use immunity, which protects the witness from "the use of compelled testimony, as well as evidence derived directly and indirectly therefrom." *Kastigar*, 406 U.S. at 453, 92 S.Ct. 1653. In *Kastigar*, the Court emphasized that "immunity from use and

When an employee is confronted with the threat of an adverse employment action for refusal to answer questions, "the very act of ... telling the witness that he would be subject to removal if he refused to answer was held to have conferred such immunity." *Uniformed Sanitation Men,* 426 F.2d at 626.[11] Under these circumstances, no specific grant of immunity is necessary: "It is the very fact that the testimony was compelled which prevents its use in subsequent proceedings, not any affirmative tender of immunity." *Gulden v. McCorkle,* 680 F.2d 1070, 1075 (5th Cir. 1982); *see also United States v. Veal,* 153 F.3d 1233, 1239 n.4 (11th Cir. 1998) ("The Fifth Amendment protection afforded by *Garrity* to an accused who reasonably believes that he may lose his

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derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Id.* By contrast, transactional immunity "affords the witness considerably broader protection than does the Fifth Amendment privilege." *Id.* Thus, the Constitution mandates use immunity where testimony is compelled, but transactional immunity is a matter of prosecutorial discretion. *See id.* at 459, 92 S.Ct. 1653.

[11] Although *Garrity* itself dealt with a situation in which employees were threatened with removal, any situation in which the employee is subject to an adverse employment action is sufficient to trigger *Garrity* immunity. *See, e.g., Uniformed Sanitation Men,* 426 F.2d 619, 621 (applying *Garrity* in a situation where employees were told generally that they would be "subject to disciplinary action" for failure to answer questions).

job if he does not answer investigation questions is Supreme Court-created and self-executing; it arises by operation of law; no authority or statute needs to grant it.").[12]

Here, the letters that Sher received from the VA on June 28 and July 2 quoted regulations stating that "[e]mployees will furnish information and testify freely and honestly in cases respecting employment and disciplinary matters. Refusal to testify ... in connection with an investigation or hearing may be ground for disciplinary action." This notification was a threat of removal sufficient to constitute coercion under *Garrity*. Under such conditions, Sher's statements and their fruits would be inadmissible in subsequent criminal prosecutions *regardless of* the subsequent letter faxed from the U.S. Attorney's Office stating that the office had declined prosecution.

We emphasize this point to clarify an apparent misconception by both the MSPB and Sher. In its decision, the MSPB stated that "we find that the letter from the U.S. Attorney was sufficient to

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[12] True, we have previously noted that "[a] state may compel incriminating answers to its questions ... if the testimony and its fruits are rendered unavailable for use in subsequent criminal proceedings, *i.e. through a grant of immunity*." *United States v. Stein*, 233 F.3d 6, 15 n.4 (1st Cir. 2000)(emphasis added). However, in light of the considerable amount of persuasive authority from other circuits on this issue, we think it clear that *Stein* should be read to mean that testimony compelled by the threat of adverse employment action *automatically* triggers a grant of immunity under *Garrity*.

provide the appellant with 'use' immunity from prosecution under the *Garrity* rule." Similarly, Sher's brief refers to the letter's "failure to confer immunity." These statements incorrectly suggest that the letter from the U.S. Attorney's Office was the source of any immunity. As a matter of law, the immunity attached automatically when Sher faced the loss of his job for refusal to testify, and the letter served at most to notify Sher of the existing immunity.

Sher thus had no basis under the Fifth Amendment for refusing to answer the VA's questions. However, in assessing the propriety of the failure to cooperate charge, we still must consider whether Sher received adequate notice from his employer of his immunity under *Garrity* to justify the failure to cooperate charge.

C. Notice of *Garrity* Immunity

The question of whether an employee has adequate notice of his immunity under *Garrity* to justify a failure to cooperate charge arises because the consequences of *Garrity* immunity are not self-evident. As the Seventh Circuit has observed:

> Uncounselled persons are much more likely to know about their "Fifth Amendment" right than they are to know about an immunity that qualifies the right. Asked to give answers to questions put to them in the course of an investigation of their arguably criminal conduct, they may instinctively "take the Fifth" and by

> doing so unknowingly set themselves up to be fired without recourse.

Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002). Thus, to provide adequate notice of immunity under *Garrity*, a government employer might have to explain two concepts. First, the employer might have to explain that the threat of an adverse employment action for a failure to answer questions means, as a matter of Fifth Amendment law, that the employee's statements and their fruits may not be used in subsequent criminal proceedings. We refer to this concept as the "application of *Garrity* immunity." Second, the employer might have to explain that the employee, now afforded the self-incrimination protection of the Fifth Amendment by operation of law, may be subject to adverse employment action for remaining silent. We refer to this concept as the "consequences of *Garrity* immunity."

The circuits have taken different approaches to the issue of whether a government employer is required to provide such notice to an employee. The Seventh Circuit has indicated that a government employer has an affirmative duty to apprise an employee of both the application and consequences of *Garrity* immunity:

> Our court has ruled in several cases that the government employer who wants to ask an employee potentially incriminating questions must first *warn* him that because of the immunity to which the cases entitle him, he may not refuse to answer the questions on

> the ground that the answers may incriminate him.

Atwell, 286 F.3d at 990. Similarly, the Federal Circuit has held that "[i]nvocation of the *Garrity* rule for compelling answers to pertinent questions about the performance of an employee's duties is adequately accomplished when that employee is *duly advised* of his options to answer under the immunity granted or remain silent and face dismissal." *Weston*, 724 F.2d at 948 (emphasis added).

Other circuits have been less directive. In *Gulden*, the Fifth Circuit found that a municipality did not have to make "an affirmative tender of immunity ... prior to an employee's appearance at a polygraph exam." 680 F.2d at 1075. Although the court referred to a *tender* of immunity, the context of this phrase indicates that the court actually meant that the employer need not *advise* the employee of the immunity conferred by *Garrity*.[13] However, because the employees did not actually show up for their interview, the court held that "the inquiry had not advanced to a level of specificity in which the competing concerns of immunity could be properly addressed," and, consequently, that "no affirmative duty (if any such duty may ever be found) had

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[13] In discussing whether an "affirmative tender of immunity" is constitutionally required, the court referred to several cases in which the Seventh Circuit held that the employer must advise the employee of the application and consequences of his immunity under *Garrity*. *See Gulden*, 680 F.2d at 1074-75 (collecting cases).

devolved upon the employer to advise [the employees] that immunity was available." *Id.* at 1076.

Similarly, in *Hester v. City of Milledgeville,* the Eleventh Circuit indicated by omission that it recognized no duty of the employer to advise the employee of the application and consequences of *Garrity* immunity. It stated: "We fail, however, to see how the city's failure to offer the plaintiffs use immunity could make any constitutional difference.... Such a guarantee would serve no useful purpose." 777 F.2d 1492, 1496 (11th Cir. 1985). The court then explained that "any grant of use immunity to the plaintiffs would have been duplicative." *Id.* (citing *Gulden,* 680 F.2d at 1073-76). The court's statement that offering immunity would serve no purpose and its silence as to any duty of the employer to provide notice indicate a view that the employer has no such duty.

This disagreement among the circuits notwithstanding, no circuit has held that an employee who is represented by counsel is entitled to notice from his employer of his *Garrity* immunity. In *Atwell,* the Seventh Circuit considered a situation in which an attorney for a municipality had told an employee under investigation that her attorney would probably instruct her to remain silent. 286 F.3d at 989. After consulting with her attorney, the employee refused to be interviewed and was terminated for insubordination. *Id.* While acknowledging its rule that employers must explain to employees the nature of their immunity under *Garrity,* the court suggested that the justification for such a duty is most compelling for unrepresented employees. *Id.* at 990. The court specifically left

open the question of "whether, in light of its rationale, [the Seventh Circuit's rule that an employer has a duty to warn an employee of his immunity under *Garrity*] has any possible application when the employee has a lawyer" and emphasized that the employee "was not being asked to meet with the investigator in the absence of her lawyer." *Id.* at 991. However, the court ultimately concluded that, because the employee did not actually attend the interview, the municipality had not violated her rights by failing to warn her about her immunity. *Id.*

The Federal Circuit also has deemed representation by a lawyer significant. In *Modrowski v. Department of Veterans Affairs*, 252 F.3d 1344, 1347 (Fed. Cir. 2001), the VA had investigated an employee for violating rules prohibiting the unauthorized sale of VA-owned property to close family members. The employee received a letter on VA letterhead stating:

> 1. The U.S. Attorney has been apprised of the situation, granted you immunity and has declined to prosecute you in the matter of the purchase of two properties by Ronald Perzanowski.
>
> 2. You are hereby notified your assertion of your Fifth Amendment rights is unnecessary since you will not be prosecuted.
>
> 3. You are therefore ordered to respond to my questions concerning this matter.

Id. at 1347. After the employee refused to answer questions until he could meet with his

attorney, the VA charged him with failure to cooperate in the investigative proceedings, and ultimately he was removed from his position. *Id.* at 1348. The court concluded that it was arbitrary and capricious to charge an employee for failing to cooperate with an investigation "[i]n the limited circumstances of the present case," noting several "dispositive factors," including the ambiguity of the scope of immunity, the existence of pending criminal proceedings on a different but related matter, and the agency's acknowledgment that it would have been reasonable to allow Modrowski to consult with counsel. *Id.* at 1352. The court specifically stated that it did not reach the question of "whether Modrowski had an absolute right to counsel" and that it did not "hold that all federal employees who are called to respond to questions in an agency investigation have the right to delay proceedings to obtain legal counsel." *Id.*[14]

In sum, the circuits have reached different conclusions about the notice, if any, that the

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[14] The dissent states that the decision in *Modrowski* was premised on the fact that "the employee did not have full access to counsel," and further states that "the same condition[ ] obtained in Sher's case." The same condition does not apply here. In *Modrowski*, the employee had no opportunity to meet with his attorney prior to questioning, whereas Sher had been represented by Lipman for over five months before the July 11 interview, Varner accompanied Sher to the interview, and Varner was able to speak to Lipman by phone during the interview.

government employer must give to an unrepresented employee about his *Garrity* immunity. However, no court has held that the government employer must give notice of *Garrity* immunity to an employee represented by counsel.

D. Sher's Circumstances

In applying this authority to Sher's circumstances, our inquiry is limited to determining whether the MSPB acted in an arbitrary and capricious manner when it concluded that the VA properly charged Sher with failure to cooperate. In the circumstances of this case, we do not have to decide whether the VA as employer had to give Sher notice of the application and consequences of his *Garrity* immunity. Regardless of whether there was any duty, Sher may be fairly charged with such notice under the circumstances present here.

Although we agree with Sher that the VA's conduct in refusing to delay the interview so that Lipman could attend was not exemplary, we cannot conclude that Sher was effectively without legal representation. Sher's brief emphasizes that the June 28 and July 2, 2001 letters from the VA stated that Sher was "entitled to a representative of [his] choice." Sher had been represented by Lipman since February 2001 and was accompanied to the interview by Varner, an attorney who had been practicing since 1979 (albeit not in criminal law). Varner consulted with Lipman on the phone during the interview. As the district court noted, it is unclear what more Lipman could have done if he had been present at the interview. Without doubt, Sher's request to delay the interview for a few days so that Lipman could attend

in person was not unreasonable; the agency had already waited four months to take administrative action.[15] Nonetheless, with Varner present and Lipman available by phone, we conclude that Sher had access to counsel of his choice. [16]

Moreover, the June 28 and July 2, 2001 letters from the VA clearly contained a threat of removal sufficient to provide notice of the application of immunity under *Garrity*. Subsequently, a July 25 letter from Lipman to Carol Moore, counsel for the VA-written after the July 11 interview but well before charges were filed against Sher on August 31-indicated that Lipman had a conversation with Moore in which she referred him to *Weston,* 724 F.2d 943, and *Hanna v. Department of Labor,* 18 Fed. Appx. 787 (Fed. Cir. 2001). As we explained in Section IV.C, *supra, Weston* held that an employee was duly advised of her immunity under *Garrity* when she and her counsel were read a statement that the U.S. Attorney's office had declined prosecution, that her failure to answer questions could subject her to removal, and her statements and their fruits would not be used criminally. 724 F.2d at 948. *Hanna* explained that, "[a]s a consequence of the

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[15] The U.S. Attorney's Office declined prosecution on March 7, 2001, and the interview did not take place until July 11, 2001.

[16] We take no position on whether there is a right to counsel under these circumstances. However, the involvement of counsel is highly relevant to our evaluation of whether Sher had notice of the application and consequences of immunity under *Garrity* and could be fairly charged with a failure to cooperate.

directive compelling [the employee] to respond to questions at the interview under threat of removal, [the employee] was automatically entitled to use immunity for any statements made at the interview" and thus had no basis for refusing to answer questions. 18 Fed. Appx. at 791.

If Sher had not been represented by counsel, these communications from the VA may or may not have provided Sher with adequate notice to justify a failure to cooperate charge. We do not have to decide that issue here because of the involvement of counsel. Since Sher received the June 28 letter more than two weeks before the scheduled interview on July 11, his attorneys had sufficient time to explain to Sher that the automatic conferral of *Garrity* immunity meant that he could answer the VA's questions without fear that his answers could be used against him in a criminal prosecution.[17] Although Moore apparently had not referred Lipman to *Weston* and *Hanna* by the time of the July 11 interview, there was ample opportunity after she did so for his attorneys to advise Sher of consequences of his immunity and schedule another interview at which he could respond to questions prior to the filing of charges on August 31.

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[17] Although a letter from the U.S. Attorney's Office declining prosecution was unnecessary to confer *Garrity* immunity, which flowed from the threat of removal itself, the VA also attempted to reassure Sher and his attorneys at the July 11 interview by obtaining a letter directly from the U.S. Attorney's Office.

Under such circumstances, we hold that Sher may be fairly charged with adequate notice of his immunity under *Garrity*.[18] Thus, the MSPB was not

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[18] The dissent attributes to the majority a rule that is nowhere to be found in the majority decision:

> [O]nce the employer requires a represented employee to answer questions under the threat of discharge, the employee automatically gets the benefit of use immunity ... and also is automatically obliged to answer questions or face discipline.... This is true ... even where, as here, the employee declines to answer his employer's questions because he has an objectively reasonable fear that his statements will not in fact be protected by use immunity.
>
> If we had concluded that a represented employee with the benefit of use immunity was automatically obliged to answer questions or face discipline, we would not have engaged in the detailed analysis of "Sher's Circumstances" in Part IV.D. Similarly, if we had concluded there was such an obligation even where the employee has an objectively reasonable fear that his statements will not be protected by use immunity, we would not have emphasized that Sher's attorneys had sufficient time to explain the application and consequences of *Garrity* immunity to him so that Sher could be fairly charged with notice of that immunity. Rather than adopting any broad rule, we have analyzed what the dissent terms the "discipline issue" by focusing on the case-specific facts which include, importantly, Sher's representation by counsel in his dealing with the VA. The dissent minimizes the importance of Sher's representation by counsel, and

arbitrary and capricious in sustaining the failure to cooperate charge.

V.

We review *de novo* the district court's grant of summary judgment with respect to Sher's claims of national origin and religious discrimination. *See* 42 U.S.C. § 2000e-2; 5 U.S.C. § 7703(c). We will affirm the order if "there is no genuine issue as to any material fact and [the VA] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Sher has presented his discrimination claim within the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[19] The parties

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> proposes a broad rule imposing a duty upon the government employer to warn the employee about the application and consequences of *Garrity* immunity, even in cases where the employee is represented by counsel. There is no case law supporting such a rule.

[19] Under this analysis, the plaintiff must first establish a prima facie case of discrimination, which is accomplished when plaintiff shows that: "(1) he is a member of a protected class; (2) he was qualified for the job; (3) the employer took an adverse employment action against him; and (4) the position remained open or was filled by a person with similar qualifications." *Kosereis v. Rhode Island*, 331 F.3d 207, 212-13 (1st Cir. 2003) (citations omitted). After the plaintiff has established this prima facie case, "[t]he burden then must shift to the employer

agree that Sher has made out a prima facie case of discrimination under *McDonnell Douglas.* As its legitimate, nondiscriminatory reason for taking adverse employment action, the VA asserts that Sher violated ethical rules governing employees, specifically: (1) his failure to cooperate with the investigation, and (2) his stipulations that he engaged in sampling and was discovered with 672 individual samples of Lipitor. Consequently, the burden of production shifts back to Sher to present evidence that these stated reasons are pretext for discrimination. We emphasize, however, that the burden of persuasion remains with Sher at all times.

Importantly, when an employer offers multiple legitimate, nondiscriminatory reasons for an adverse employment action, a plaintiff generally must offer evidence to counter each reason. In *Rathbun v. Autozone, Inc.,* 361 F.3d 62, 79 (1st Cir. 2004), we upheld summary judgment for the defendant because the plaintiff's proffers, "[e]ven if fully credited ...

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to articulate some legitimate, nondiscriminatory reason" for the adverse employment action. *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817. If the defendant meets this requirement, the burden of production shifts back to the plaintiff, who must offer evidence showing that the defendant's proffered reason is pretext for discrimination. *Id.* at 804, 93 S.Ct. 1817. While the *McDonnell Douglas* analysis thus shifts the burden of production, the burden of persuasion remains with the plaintiff at all times. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

succeed only in calling into doubt one of several rationales that [the employer] has advanced for its decision." [20] Similarly, in *Connell v. Bank of Boston,* 924 F.2d 1169, 1177 (1st Cir. 1991), we found plaintiff's evidence insufficient when he had rebutted only one of his employer's two stated reasons for the adverse employment action.[21]

Our precedent is consistent with decisions in the other circuits. The Third Circuit has held that

> to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that *each* of the employer's proffered non-discriminatory reasons was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext).

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[20] Although *Rathbun* involved claims filed under Rhode Island law, we analyzed the claims under the *McDonnell Douglas* burden-shifting framework. *See Rathbun,* 361 F.3d at 73.

[21] *Connell* involved an action under the Age Discrimination in Employment Act ("ADEA"). Although the Supreme Court has not yet decided whether the same framework applies to Title VII and ADEA claims, the courts of appeals have treated such claims similarly. *See Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 141-42, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (collecting cases). We have also employed parallel approaches to such claims. *See, e.g., Fontanez-Nunez v. Janssen Ortho LLC,* 447 F.3d 50, 55 (1st Cir. 2006).

Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (internal citations omitted); *see also Bodenheimer v. PPG Indus.*, 5 F.3d 955, 958 (5th Cir. 1993). Similarly, the Seventh Circuit has held:

> [Plaintiff] has successfully demonstrated that genuine issues of material fact exist regarding four of the six reasons proffered by [defendant] for his dismissal. We conclude, however, that [plaintiff] has ultimately failed to carry his burden of showing pretext because the four reasons which he has successfully called into question are neither "so intertwined," nor "so fishy" as to call the remaining two reasons into doubt.

Wolf v. Buss (America) Inc., 77 F.3d 914 (7th Cir. 1996) (citation omitted). Thus, Sher must provide evidence that *both* the failure to cooperate charge and the sampling charge were pretext for discrimination.

We find that Sher has not met this burden with respect to the failure to cooperate charge. In his brief, he acknowledges that the VA has cited his failure to cooperate as a legitimate, nondiscriminatory reason for the adverse employment action, yet he fails to adduce any evidence whatsoever to show that this charge is pretext for discrimination. Moreover, our finding that Sher has failed to meet his burden on the failure to cooperate charge does not hinge on our conclusion that the MSPB was not arbitrary and capricious in agreeing with the VA that Sher violated agency

regulations by failing to cooperate. Even if we were incorrect in this conclusion, the failure to cooperate charge may still serve as a legitimate, nondiscriminatory justification for the adverse employment action, so long as Sher offers no evidence showing that the charge itself was pretext for discrimination. Sher bears the burden of persuasion on this issue, and he has failed to carry it.

Because Sher's showing on the failure to cooperate charge was inadequate, he necessarily cannot show that *each* of the VA's legitimate, nondiscriminatory reasons for his removal was pretext for discrimination.[22] Thus, in light of this

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[22] After *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), even without direct evidence of discrimination, Sher could have presented a mixed motive theory of discrimination rather than the single motive theory he has presented. In a mixed motive case, the plaintiff would only have to establish that national origin or religious discrimination was a motivating factor in the analysis, rather than the sole basis for the decision. *See id.* However, Sher has not pursued a mixed motive theory. Before the district court he proceeded under a single motive theory, permitting us to conclude that he must raise a genuine issue of material fact with respect to each of the VA's proffered legitimate nondiscriminatory reasons. Sher may have had good reasons for taking the approach he has chosen-for example, the remedies he would receive under the mixed motive approach would be more limited if the VA successfully asserted, as an affirmative defense, that it would have made the same decision even in the absence of the impermissible motivating factor. *See, e.g., Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60 (1st Cir. 2002). However, Sher's failure to assert a mixed motive claim before the district court amounts to a waiver of the claim. *See, e.g.,*

failure, we find that the district court properly granted summary judgment to the VA on Sher's Title VII claim.

The Federal Circuit has noted the "well-established rule of civil service law that the penalty for employee misconduct is left to the sound discretion of the agency." *Miguel v. Dep't of the Army*, 727 F.2d 1081, 1083 (Fed. Cir. 1984). Thus, "[i]t is only where the transgression is so minor, and a discharge based thereon 'so unduly harsh and unwarranted,' that the dismissal could be considered as constituting 'an abuse of discretion that demands redress by this court.' " *Heffron v. United States*, 186 Ct.Cl. 474, 405 F.2d 1307, 1312 (1969) (citations and omissions omitted).

The penalty the VA imposed was not "unduly harsh." Courts have repeatedly held that removal from employment is justified for failure to cooperate with an investigation. *See, e.g., Atwell*, 286 F.3d at 991; *Weston*, 724 F.2d at 948. Since Sher was not even removed from employment, but rather received a forty-five day suspension, a demotion, and reduction in pay grade, the penalty falls within established reasonable bounds.

Affirmed.

Ramirez Rodriguez v. Boehringer Ingelheim Pharm., Inc., 425 F.3d 67, 78 n. 12 (1st Cir. 2005); *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 31 (1st Cir. 2003).

STAHL, Senior Circuit Judge, dissenting.

I write briefly in dissent because I believe that Sher had an objectively reasonable concern that his statements could be used against him in a subsequent prosecution, based on the inaccurate letter he received from the U.S. Attorney's Office. Therefore, I would hold that the failure to cooperate charge impinges on Sher's Fifth Amendment right against self-incrimination and his rights under *Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).

In my view, *Garrity* and its progeny address two separate questions. The first ("the immunity question") is whether a government employee's statements to his employer are in fact protected from use in subsequent criminal prosecutions. The majority is correct that an employee's statements are protected by use immunity as soon as his employer requires him to speak under threat of losing his job. *See, e.g., Uniformed Sanitation Men v. Comm'r of Sanitation,* 426 F.2d 619, 626 (2d Cir. 1970), *cert. denied,* 406 U.S. 961, 92 S.Ct. 2055, 32 L.Ed.2d 349 (1972). However, this question is not directly at issue in this case, as no subsequent prosecution was brought against Sher.

The second question ("the discipline question"), which Sher's appeal does implicate, is whether a government employee can be fired or otherwise disciplined for maintaining his silence in the face of his employer's questions. The majority concludes that, at least where the employee is represented by counsel, he can be disciplined for maintaining his silence at the point that use immunity attaches. In

other words, according to the majority, the immunity question and the discipline question are answered using the exact same test: once the employer requires a represented employee to answer questions under the threat of discharge, the employee automatically gets the benefit of use immunity (under the immunity question) and also is automatically obliged to answer questions or face discipline (under the discipline question). This is true, the majority says, even where, as here, the employee declines to answer his employer's questions because he has an objectively reasonable fear that his statements will not in fact be protected by use immunity.

A. Which Rule Should Govern the Discipline Question?

Given the complexity of this area of the law, it is not surprising that the circuits are split as to whether a government employer is required to advise an employee of his rights and obligations before he can be disciplined for maintaining his silence. As I read the cases, three circuits-the Fifth, Eighth, and Eleventh-have arguably held that the government employer does not have a disclosure obligation. *See Hill v. Johnson,* 160 F.3d 469, 471-72 (8th Cir.1998) ("[T]he mere failure affirmatively to offer immunity is not an impermissible attempt to compel a waiver of immunity."); *Hester v. City of Milledgeville,* 777 F.2d 1492, 1496 (11th Cir. 1985) ("We fail ... to see how the city's failure to offer the plaintiffs use immunity could make any constitutional difference.... [A]ny grant of use immunity to the plaintiffs would have been duplicative."); *Gulden v. McCorkle,* 680 F.2d 1070, 1075 (5th Cir. 1982), *cert. denied,*459 U.S. 1206, 103 S.Ct. 1194, 75 L.Ed.2d 439 (1983) ("Failure

to tender immunity was simply not the equivalent of an impermissible compelled waiver of immunity."). However, even among these circuits, the answer at least in the Fifth and Eleventh circuits is not wholly clear.[23]

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[23] The cases cited address the question of whether immunity must be "tendered" to the employee by the government. They do not, however, address the somewhat different question, raised by Sher's appeal, of whether discipline is permitted where the employee remains silent because he has an objectively reasonable fear that his answers could be used against him in a later prosecution. The Fifth Circuit considered this question in *Arrington v. County of Dallas*, 970 F.2d 1441, 1446 (5th Cir. 1992), and concluded that, where the government allegedly warned the employee that his answers *could* be used against him in a subsequent prosecution, the employee was within his rights to remain silent and could not be disciplined for that choice. In addition, the Fifth Circuit's decision in *Gulden* did not reach the question of whether, had the employees actually attended a required polygraph examination, the government would have had an affirmative duty to advise them that "immunity was available." 680 F.2d at 1076. The Eleventh Circuit's approach on this issue is also less than clear. The *Hester* decision can be read as only addressing the immunity question (whether use immunity had attached where the employer did not "offer" such immunity) rather than the discipline question (whether the employee can be disciplined for maintaining his silence). *See* 777 F.2d at 1496. Also, the Eleventh Circuit has expressed concern, albeit in dicta, about employees who are unclear about the scope of their immunity when they decide whether to cooperate with an investigation. *See Benjamin v. City of Montgomery*, 785 F.2d 959, 962 (11th Cir. 1986) ("[W]e cannot require public employees to speculate whether their statements will later be excluded under *Garrity*.").

In contrast, three circuits-the Second, Seventh, and the Federal Circuit [24] have concluded that the government has a disclosure obligation. *See Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002) ("[T]he government employer who wants to ask an employee potentially incriminating questions must first *warn* him that because of the immunity to which the cases entitle him, he may not refuse to answer the questions on the ground that the answers may incriminate him."); *Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344, 1351 (Fed. Cir. 2001) ("Invocation of the *Garrity* rule for compelling answers to pertinent questions about the performance of an employee's duties is adequately accomplished when that employee is duly advised of his options to answer under any immunity actually granted or remain silent and face dismissal."); *Sanitation Men*, 426 F.2d at 627 (permitting the firing of an employee for remaining silent where "only pertinent questions" are asked "about the performance of his duties" and he is "duly advised of his options and the consequences of his choice."). In addition, the Tenth Circuit has suggested the same result in dicta. *See In re Grand Jury Subpoenas Dated December 7 and 8 v. United States*, 40 F.3d 1096, 1102 n. 5 (10th Cir. 1994), *cert. denied*, 514 U.S. 1107, 115 S.Ct. 1957, 131 L.Ed.2d 849 (1995)

[24] Because, as the majority notes, most petitions for review of a final order of the Merit Systems Protection Board are filed in the Federal Circuit, *see* 5 U.S.C. § 7703(b)(1), close consideration of that court's approach in *Garrity* cases is instructive.

("While this case does not require us to decide whether the government must affirmatively advise [an employee of his rights under *Garrity*], other circuits arguably have adopted such a requirement.").

I would adopt the latter rule-that the government employer has a disclosure obligation-because it fulfills the inherently protective nature of the Supreme Court's decisions in *Garrity* and its progeny.[25] While government employees may understand that they have a Fifth Amendment right to remain silent, they may not understand the complex exceptions to that rule under *Garrity*. *See Atwell,* 286 F.3d at 990. Thus, in my opinion, the rule adopted by the majority leaves government employees vulnerable to discipline when they believe they are simply exercising a basic constitutional right. Also, more ominously, the enunciated rule permits the government to fire an employee for maintaining his silence, even where the government makes incorrect, misleading, or threatening statements regarding the employee's rights. *See Hill,* 160 F.3d at 473 (Heaney, J., dissenting) ("As a practical matter, the majority's analysis impermissibly leaves public employees ... uninformed and guessing as to how their statements may be

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[25] The burden on the government under such a rule would be quite low. The Federal Circuit, for example, found sufficient the government employer's use of a standardized disclosure form as it was "a model of clarity" and "amply and fully conveyed" the employee's rights. *See Hanna v. Dep't of Labor,* 18 Fed. Appx. 787, 789-90 (Fed. Cir. 2001).

used, what their constitutional rights are, and how to respond to ambiguous requests for statements, answers to questions, or polygraph examinations. I do not find this to be constitutionally allowable.").

I also take issue with the majority's decision not to adopt a firm rule to govern the discipline question. The majority declines to determine whether the government has a disclosure obligation, and instead bases its conclusion entirely on the fact that Sher was accompanied by substitute counsel at his interview. For three reasons, I believe this is a flawed basis for the majority's conclusion. First, failing to adopt a clear rule leaves government employees in this circuit unsure of whether their employer is required to disclose their rights before they can be fired for remaining silent. This is just the kind of uncertainty that *Garrity* and its progeny intended to eliminate.

Second, the majority's legal basis for drawing the line at representation is weak. While the majority may be correct that "no circuit has held that an employee who is represented by counsel is entitled to notice from his employer of his *Garrity* immunity," it also seems true that no circuit has held the opposite. In other words, no circuit has drawn the line where the majority draws it today.

The majority cites two decisions--*Atwell*, 286 F.3d at 990-91, and *Modrowski*, 252 F.3d at 1352--neither of which justifies its conclusion that a represented employee can be disciplined for maintaining his silence once use immunity has attached. First, the passage the majority cites from *Atwell* is pure dicta. *See* 286 F.3d at 991. In *Atwell*,

the Seventh Circuit held that a discharged employee's Fifth Amendment right was not violated because the employee failed even to attend a scheduled investigative interview. *See id.* Though the court discussed the significance of the employee's legal representation in dicta, its decision did not turn on that fact.

The majority also cites the Federal Circuit's decision in *Modrowski,* a case that is inapposite to the majority's reasoning and conclusions. As a preliminary matter, *Modrowski,* unlike the majority here, required that the employer "duly advise" the employee of his rights before he could be disciplined for remaining silent, 252 F.3d at 1351, and also took account of the employee's reasonable belief regarding whether his statements would be used against him in a subsequent criminal prosecution, *id.* at 1350-51. Both of these rules are ones I would have adopted in this case. In addition, the *Modrowski* court reversed the employee's failure to cooperate charge for two primary reasons: (1) the declination to prosecute letter from the U.S. Attorney's Office was ambiguous in scope, and (2) the employee did not have full access to counsel. *Id.* at 1352-53. In my view, the same conditions obtained in Sher's case. The majority makes an error of logic when it concludes that, because *Modrowski* held that the employee should have had full access to counsel, it must logically follow that (a) full access to counsel would have relieved the government of any disclosure obligation, and (b) with full access to counsel, the employee's subjective view of his legal predicament would not have been relevant. These conclusions simply do not flow logically from *Modrowski*'s concern that the

employee could not make an informed decision, where, among other things, he was deprived of access to counsel. To say, as *Modrowski* did, that not having counsel deprives one of rights, is emphatically not the same as saying, as the majority does, that having counsel automatically guarantees those rights.

The third problem with the majority's choice to base its decision solely on the fact of representation is that, in this case, the Veterans Administration (VA) investigators denied Sher's request to postpone his interview by a mere two days so his counsel of choice could attend the interview with him. This, despite the VA's written assurance that Sher was entitled to a representative of his choice. The VA's denial of Sher's reasonable postponement request forced him to attend the interview with his attorney's partner, who was not familiar with Sher's case or the relevant area of law. In sum, the majority has applied a novel legal rule to a questionable factual scenario, thus yielding a conclusion that permits public employers to discipline employees for maintaining their silence while unreasonably burdening their access to legal advice.

B. The Letter from the U.S. Attorney's Office

Unlike the majority, because I believe the government has a disclosure obligation, I think the letter from the U.S. Attorney's Office is of crucial importance.[26] The letter stated that criminal

[26] Even under the majority's rule, I believe that a represented employee who reasonably believes, based on the government's words and actions, that his statements may indeed be used

prosecution had been declined as to three episodes of sampling by Sher. However, the letter included one date on which no sampling had occurred (February 2001) and did not mention two dates on which Sher had acknowledged requesting samples for personal use (June 2000, and December 2000). In other words, as in *Modrowski*, 252 F.3d at 1352, the scope of Sher's immunity was ambiguous and Sher had a reasonable basis to believe that his answers or their fruits could be used against him in a subsequent criminal prosecution. Therefore, he chose to invoke his right to remain silent pending clarification of the scope of his immunity. [27]

On the facts of this case, I would hold that the failure to cooperate charge violated Sher's Fifth Amendment right and his rights under *Garrity*.[28]

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against him, should not be punished for invoking his constitutional right to remain silent.

[27] It is worth noting that Sher had previously met with investigators on two occasions, without counsel, and had answered their questions in full. In addition, after Sher refused to answer questions at his third interview, his attorney sent two follow-up letters to the VA requesting clarification of the scope of his immunity and reiterating Sher's willingness to cooperate as long as his right against self-incrimination was protected.

[28] The majority dismisses Sher's claim that the punishment imposed upon him was an abuse of discretion because, the majority says, "[c]ourts have repeatedly held that removal from employment is justified for failure to cooperate with an investigation." However, the majority does not consider whether, if the failure to cooperate charge were not sustained,

Because of the inaccurate letter from the U.S. Attorney's Office, Sher had an objectively reasonable basis to believe that his statements could be used against him in a future prosecution. The majority's view that the mere presence of an attorney, and a last minute replacement at that, means that we

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Sher's punishment would survive review based only on the sampling charge. Because I do not believe the failure to cooperate charge should be sustained, I would reexamine Sher's punishment on the sampling charge, in light of the *Douglas* factors. *See Douglas v. Veterans Admin.*, 5 MSPB 313, 332, 5 M.S.P.R. 280 (1981). I would particularly consider the ninth *Douglas* factor-the clarity with which the employee was on notice of any rules that were violated. *Id.* Sher maintains that his understanding of the Togus sampling policy was that it only barred giving drug samples to patients, but permitted employees to receive samples for personal use. Sher's understanding was echoed by overwhelming testimony from numerous employees (both physicians and pharmacists) that they also understood that sampling for personal use was permitted. Indeed, several witnesses testified that they had openly sampled for personal use, believing it was permissible. Arguably, the Togus facility's written policy on sampling is consistent with the employees' understanding: "Due to Federal regulations regarding drug diversion, SAMPLING IS NOT PERMITTED within the Medical Center." In other words, sampling as to patients was not allowed because Togus was concerned that patients who received drug samples might sell them for money ("drug diversion") instead of taking the medication themselves. Thus, because the VA did not make clear to its employees that sampling for personal use was prohibited, I would reconsider Sher's punishment, based on the *Douglas* factors.

should close our eyes to the legitimately alarming impact that the letter had on Sher's understanding of his legal predicament, is unconvincing formalism and certainly not consistent with the protective nature of the Supreme Court's jurisprudence in this area. I therefore respectfully dissent.

United States District Court, D. Maine.

Alam SHER, Plaintiff,
v.
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS Defendant.

No. Civ. 04-182-B-W.

Feb. 27, 2006

WOODCOCK, J.

This Court upholds a Merit System Protection Board decision not to reopen a case to receive new material, because it concludes the evidence would have been either cumulative or immaterial.

I. BACKGROUND

A. The Facts

On October 20, 2004, Alam Sher filed with this Court an employment discrimination claim and appeal of a final order of the Merit Systems Protection Board (MSPB), complaining of actions taken by the United States Department of Veterans Affairs (VA). *Complaint* (Docket # 1). Dr. Sher [1] served as the Chief of Pharmacy Services at the VA Medical Facility at Togus, Maine (Togus VA). *See Defendant's Statement of Material Facts* at ¶ 3 (Docket # 10)(DSMF); *Plaintiff's Response to Defendant's Statement of Material Facts* at ¶ 3

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[1] Alam Sher holds a Pharm.-D. in Pharmacy and an M.B.A.; he prefers the professional title, doctor.

(Docket # 29)(PRDSMF). By letter received August 21, 2001, the Chief of Staff at Togus VA charged him with, among other things, personal use of drug samples he solicited from representatives of the pharmaceutical industry, and proposed that Dr. Sher be terminated from employment.[2] *See DSMF* at ¶ 50; *PRDSMF* at ¶ 50. On October 22, 2001, the Director of Togus VA concluded that Dr. Sher had violated agency rules against acceptance of gifts from prohibited persons, imposed a 45-day suspension without pay, and removed him as Chief with a corresponding reduction in pay. *DSMF* at ¶ 55; *PRDSMF* at ¶ 55. Dr. Sher requested a hearing before an Administrative Law Judge (ALJ), who sustained that portion of the VA's charges relating to improper sampling, but concluded the violation was technical and deserved no penalty. *DSMF* at ¶ 66; *PRDSMF* at ¶ 66. Dr. Sher and the VA cross-appealed to the full MSPB, which on September 16, 2004 sustained the VA's decision in its entirety, reimposing the 45-day suspension and demotion. *DSMF* at ¶ 69; *PRDSMF* at ¶ 69.

B. New Evidence and New Motions

On March 23, 2005, Dr. Sher attended a monthly meeting of the full staff of the Pharmacy Service at Togus VA. At the meeting, the VA showed Dr. Sher and other attendees a VA videotape entitled

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[2] The parties use the term, "sampling", to describe the practice whereby the pharmaceutical industry gives samples of medicine to health care professionals. *See DSMF* at ¶ 14; *PRDSMF* at ¶ 14.

"Employee Integrity and Pharmacy Security". This videotape, which was dated March 1994, contains dialogue that Dr. Sher contends establishes that the VA approved of its employees' solicitation and personal use of complimentary samples from pharmaceutical companies. The VA failed to turn over this videotape despite an Acknowledgement Order from the ALJ mandating that the VA copy all documents relevant and material to Dr. Sher's appeal.

Procedurally, on April 22, 2005, Dr. Sher raised this issue by filing a motion to amend the administrative record. *Pl.'s Mot. to Amend Admin. Record* (Docket # 16); *Pl.'s Am. Mot. to Amend Admin. Record* (Docket # 21)(*Pl.'s Am. Mot. to Amend.*). In his motion, Dr. Sher strenuously pressed the contention that the VA acted in bad faith in failing to turn over what he believes is crucial information, thereby depriving the ALJ, the MSPB, and this Court of compelling evidence that the VA condoned the practice for which it disciplined the doctor. *Pl.'s Am. Mot. to Amend.* On May 5, 2005, the VA responded with a Motion to Strike the videotape. *Def.'s Mot. to Strike* (Docket # 23). Two months earlier, the VA had filed a motion for judgment. *Def.'s Mot. for J.* (Docket # 9).

This Court referred all motions to Magistrate Judge Kravchuk for recommended decision. On August 4, 2005, the United States Magistrate Judge issued two decisions. The first denied Dr. Sher's motion to amend and granted the VA's motion to strike, "because the significance of 'newly discovered evidence' is a matter for the MSPB to consider in the first instance in the context of a petition for review of

its initial decision ..." and "because it is apparent that the court ought not reverse or remand the MSPB's administrative decision on the basis of newly discovered evidence". *Mem. of Decision on Pl.'s Mot. to Amend Admin. Record and Def.'s Mot. to Strike* at 3 (Docket # 35)(*Mem. of Decision*). The second recommended summary judgment against Dr. Sher as there was "no direct evidence in the record of discriminatory animus" and no "trialworthy issue on the existence of animus".*Recommended Decision on Def.'s Mot. for J.* at 30 (Docket # 36)(*Recommended Decision*).

On August 18, 2005, following the Magistrate Judge's Orders, Dr. Sher filed an "Objection to the Magistrate's Recommended Decision Granting Judgment on the Record and Objection to the Memorandum Decision Denying Amendment of the Record with Incorporated Motion for Stay". (Docket # 38)(*Pl.'s Objection*). He also petitioned the MSPB to reopen the administrative record. *Id.* at 5 n1. On September 7, 2005, the MSPB declined to hear the petition, stating that the Board's regulations do not provide for requests for reconsideration of its final decision. *Letter of U.S. Merit Systems Protection Board* (Docket # 40-Attach. 1). On September 19, 2005, Dr. Sher filed with this Court a Motion to Reconsider Motion to Amend the Record and for Relief, along with an amended objection to the Recommended Decision, asserting that because the MSPB declined jurisdiction, this Court assumes exclusive jurisdiction to amend the Administrative Record. (Docket # s 40, 41).

II. DISCUSSION

The pending appeal, the motion to amend administrative record, and the MSPB's declination of Dr. Sher's motion leave something of a procedural muddle. Depending on how the issue is viewed, the standards for review may differ; however, this Court concludes that, however conceived, the result is the same.

A. Motion to Strike; Motion to Amend

i. Standard of Review

Dr. Sher's motion to amend and the VA's motion to strike are non-dispositive and the Magistrate Judge's August 4, 2005 decision on these motions may not be modified or set aside unless clearly erroneous or contrary to law.Fed.R.Civ.P. 72(a). At the same time, this Court will consider the impact, if any, of the MSPB's September 7, 2005 refusal to reopen the administrative record.

ii. MSPB Action: Refusal to Reopen or Reconsider

On September 7, 2005, the MSPB responded to Dr. Sher's petition to reopen the administrative record as follows:

> This is in response to your request for reconsideration of the Board's order dated September 16, 2004 in the appeal named above.
>
> The order included a specific statement that it represents the final decision of the Board in this appeal and also notified you of your further review rights. The Board's regulations do not

> provide for your request for reconsideration of the Board's final decision. There is, therefore, no further right to review of this appeal by the Board.

Letter of U.S. Merit Systems Protection Board.

The MSPB's letter can be viewed variously as a refusal to reopen the administrative record or a determination that Dr. Sher does not have the right to have the MSPB reconsider a final decision.

iii. MSPB Regulations

MSPB procedure on petitions for review is governed by regulation. *See* 5 C.F.R. § 1201.114-120. A party may file a petition for review of an ALJ's initial decision within 30 days after receipt or 35 days after issuance, whichever is longer. 5 C.F.R. § 1201.114(d). The MSPB bases its review on the record developed by the ALJ. *See, e.g.,* 5 C.F.R. § 1201.115(a). The parties are required to close the record within certain time limits and once closed, "no additional evidence ... will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed." 5 C.F.R. § 1201.114(i). The MSPB may grant a petition for review if it is established that "the decision of the judge is based on an erroneous interpretation of statute or regulation" or if "[n]ew and material evidence is available that, despite due diligence, was not available when the record closed." 5 C.F.R. § 1201.115(d). It has the authority to "[r]emand the appeal so that the judge may take further testimony or evidence or make further findings or conclusions." 5 C.F.R. § 1201.117(a)(4). Once the MSPB issues a

final decision, the employee adversely affected by the decision may obtain judicial review. 5 C.F.R. § 1201.120. The regulations allow a petition for reconsideration, but only by the Director of the Office of Personnel Management and on limited grounds.[3] 5 C.F.R. § 1201.119. On the other hand, the MSPB is authorized to "reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions...." 5 C.F.R. § 1201.118.

iv. MSPB Denial as a Ruling on a Motion for Reconsideration

Even though apparently styled as a petition to reopen,[4] the Board's response suggests it deemed Dr. Sher's motion as one for reconsideration.[5] If so, the

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[3] The Director of the Office of Personnel Management is authorized to file a petition for reconsideration of a final Board order only if he or she determines that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management, and its decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. 5 C.F.R. § 1201.119(a)(1),(2). The petition for reconsideration must be filed within 35 days after the date of service of the Board's final order. *Id.* at 1201.119(b).

[4] This Court uses "apparently" because Dr. Sher has not provided the Court with a copy of the motion. *See Pl.'s Mot. to Reconsider Mot. to Amend the Record and for Relief* at 4 (Docket # 40).

[5] Under § 1201.118, the Board has the right to reopen an appeal and reconsider a decision of a judge on its own motion at any time. By contrast, a petition for reconsideration under § 1201.119 is time limited, is restricted to the Director of the

Board was acting within its authority to refuse to consider it. Under § 1201.119, the right to file a petition for reconsideration is limited to the OPM. While § 1201.118 allows the MSPB to reopen the record and reconsider a decision on its own motion, there is no statutory or regulatory authority, comparable to that found in § 1201.119, for an employee to petition the MSPB to reconsider its decision. *Mudrich v. Dep't of Agric.*, 93 M.S.P.R. 313, 314 (2003) ("While the Director of the Office of Personnel Management may petition for reconsideration of a Board final order within 35 days after the date of service, (citation omitted), there is no similar rule permitting other parties or non-parties to do so."). Even assuming in these circumstances the Board could reconsider a decision upon motion of the employee, *see Moss v. Dep't of the Air Force*, No. 99-3336, 1999 WL 1211870, *2 (Fed. Cir. Dec. 10, 1999) (unpublished), there is no requirement it do so. Further, at least while Dr. Sher's action was pending in federal court, the MSPB may not have jurisdiction over *any* request for reconsideration. *See Anthony v. OPM*, 70 M.S.P.R. 214, 218 (1996) ("Although the pendency of an appeal to the Federal Circuit deprives the Board of jurisdiction to consider a request for reconsideration, such a request can be considered following the court's

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Office of Personnel Management, and is limited as to permissible grounds.

decision on appeal") (citing *Anderson v. Dep't of Transp.*, 46 M.S.P.R. 341, 350-51 (1990), *aff'd*, 949 F.2d 404 (Fed. Cir. 1991)(unpublished)).

v. MSPB Denial as a Refusal to Reopen the Record

Under § 1201.118, the MSPB has the authority without time limit to reopen the record or review a judge's decision *sua sponte*.[6] 5 U.S.C. § 7701(e)(1)(B); 5 C.F.R. § 1201.118 ("The Board may reopen an appeal and reconsider a decision of a judge on its own motion *at any time*, regardless of any other provisions of this part.")(emphasis supplied); *Wright v. United States Postal Serv.*, 183 F.3d 1328, 1332 (Fed. Cir. 1999) (citations omitted). Although the Board has the authority to reopen an appeal from an ALJ's initial decision, it is unclear that this authority would extend to reopening its own decisions after they become final. 5 C.F.R. § 1201.118 (The Board may reopen an "appeal and reconsider a decision of a *judge* on its own motion at any time ....")(emphasis supplied); *see Timmers v. MSPB*, No. 04-3279, 2005 WL 564278, *2-*3 (Fed. Cir. Mar. 10, 2005)(unpublished); *Moss v. Dep't of the Air Force*, 82 M.S.P.R. 309, 312 (1999), *aff'd*, 1999 WL 1211870 (Fed. Cir. Dec. 10, 1999)(unpublished); *Anthony v.*

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[6] Under § 1201.115, the MSPB has the authority to grant a petition for review when it is established that "[n]ew and material evidence is available that, despite due diligence, was not available when the record closed...." This provision sets forth the bases for the Board's review, but it does not provide a regulatory basis for a petition to reopen after the Board's decision has become final.

OPM, 70 M.S.P.R. 214, 218 (1996); *Wright v. Dep't of VA*, 95 M.S.P.R. 231, 235 (2003). *See also Lugo v. MSPB*, No. 04-3358, 2005 U.S. App. LEXIS 5932, *2 (Fed. Cir. Apr. 11, 2005)(unpublished).

New evidence is "material" if it is "of sufficient weight to warrant an outcome different from that of the initial decision." *Kursar v. Dep't of Trans.*, No. 05-3195, 2005 U.S. App. LEXIS 27236, *9 (Dec. 12, 2005) (unpublished opinion)(quoting *Bucci v. Dep't of Educ.*, 42 M.S.P.R. 47, 55 (1989)). The MSPB has "exercised its discretion to reopen cases to prevent what it perceived to be 'manifest injustice to the appellant's substantive rights.' " *Timmers*, 2005 WL 564278 at *3 (quoting *Fields v. OPM*, 79 M.S.P.R. 659, 661-62 (1998)). In *Fields*, for example, the Board reopened a case where the Office of Personnel Management erroneously concluded that the decedent, a federal employee, was married at the time of his death. *Id.* at 663. Even so, the MSPB has "broad discretion" to decide "whether to reopen a case...." *Timmers*, 2005 WL 564278 at *2.

Dr. Sher describes his motion as a petition "to reopen the administrative record." *Pl.'s Mot. to Reconsider Motion to Amend the Record and for Relief* at 4 (Docket # 40). It is doubtful, however, that the MSPB considered Dr. Sher's petition to be a motion to reopen. The MSPB responded that its regulations "do not provide for your request for reconsideration of the Board's final decision", which may suggest the Board treated the petition as a petition for reconsideration.

However, if the MSPB letter is considered a response to a motion to reopen under § 1201.118, the

scope of this Court's authority to review the MSPB's decision not to reopen is unclear. The Federal Circuit has not decided the question. *Lugo,* 2005 U.S. App. LEXIS 5932 at *3; *Zamot v. MSPB,* 332 F.3d 1374, 1378 (Fed. Cir. 2003)("an issue the court has left open"). Assuming this Court has the authority to assess whether the Board's refusal to reopen constitutes an abuse of discretion, *Nelson v. FDIC,* 83 F.3d 1375, 1377 (Fed. Cir. 1996), the objecting party still has a "heavy burden" to demonstrate that the Board erred in exercising its discretion not to reopen. *Zamot,* 332 F.3d at 1378 (citations omitted).

vi. Motion to Reopen as Motion to Amend Record

Most likely, Dr. Sher's motion to amend administrative record is not seeking a review of the MSPB's refusal to reopen the record or to reconsider its decision at all, but is asking this Court to expand the record to assure a complete evaluation of the merits of the pending challenge. Generally, courts limit their review of MSPB decisions to the administrative record developed below. *See* 5 U.S.C. § 7703(c); *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) ("In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); *Olsen v. United States,* 414 F.3d 144, 155 (1st Cir. 2005). However, a reviewing court may go beyond the administrative record in certain narrow circumstances. The Supreme Court said in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99,

97 S.Ct. 980, 51 L.Ed.2d 192 (1977), that the district court "may" (although it is not required to) supplement the record where there is "a strong showing of bad faith or improper behavior" by agency decision makers. *Olsen,* 414 F.3d at 155. Alternatively, supplementation of the record may be permissible where there is a "failure to explain action as to frustrate effective judicial review." *Id.* (quoting *Camp,* 411 U.S. at 142-43).

vii. The ALJ and MSPB Decisions

Here, the new evidence consists of the training videotape the VA produced in March 1994. During the videotape, there is a discussion about whether the Chief of a VA pharmacy can accede to a medical doctor's request for prescriptive medicine for his brother-in-law that insurance does not cover. The VA pharmacist refuses to give the medicine to the doctor, but tells him he can "give you the phone number of the drug manufacturer's rep and ... you can give him a call and work on getting a complimentary supply." (Docket # 16-Exh. A). Dr. Sher vociferously asserts that this dialogue amounts to an expression of VA approval of the practice of sampling and he castigates the VA for acting in "bad faith" by concealing the videotape and submitting evidence at the ALJ hearing contrary to its own policies.[7] *Pl.'s Objection*

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[7] There is no evidence to support Dr. Sher's assertions of bad faith and fraud. To the contrary, if the VA had deliberately failed to disclose the videotape to Dr. Sher during discovery, it would be passing strange for the Agency to use it for training Dr. Sher while his case was on appeal. The burden to

at 7.

Dr. Sher saw the videotape in March 23, 2005, years after his conduct, and he cannot and does not contend that the videotape actively led him to misinterpret VA policy and engage in prohibited conduct. Instead, Dr. Sher essentially argues two points: (1) that the videotape informally confirms VA practice on sampling; and, (2) that the videotape formally reflects VA policy on sampling.

On the first point, the videotape is merely cumulative. The ALJ and the MSPB found that the practice of sampling at the VA was commonplace and that Dr. Sher did not believe what he was doing violated VA policy. The ALJ found a pattern of actual practice at the VA consistent with the videotape and by the weight of substantial evidence that "the request/receipt of drug samples from pharmaceutical company representatives is part of the ingrained culture of doing business at a VA medical facility, as it is in the medical community generally, and has been for many years." *Admin. Record* at 34 (Initial Decision of ALJ)[Bate Stamped # 684]. In fact, the ALJ wrote that Dr. Sher "cannot be faulted for honestly believing there was absolutely nothing wrong with the practice." *Id.* He found that

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demonstrate bad faith or fraud rests with Dr. Sher and it is just, if not more, plausible that the Agency did not produce the videotape during discovery because it was unaware that it had any relevance to Dr. Sher's case.

"no one had ever indicated to the appellant in his 18 years with the agency that the practice was in any sense improper, illegal, or unethical." *Id.* His conclusion was that "while the request/receipt of 'gifts' is unethical, and the Lipitor at issue was technically a 'gift' under the ethics regulations, I otherwise find that the appellant's technical violation of those regulations is not serious under the particular circumstances of his case." *Id.* at 36 [Bate Stamped # 686]. The ALJ determined the penalty was too harsh for Dr. Sher's technical violation and ruled no penalty was warranted. *Id.* at 40 [Bate Stamped # 690].

The MSPB reinstated the VA's penalty. It noted the ALJ's finding that other VA employees had accepted sample drugs and that Dr. Sher did not believe there was a prohibition against doing so. *Admin. Record* at 12 (Opinion and Order) [Bate Stamped # 815]. However, the MSPB cited the Standards of Ethical Conduct for Employees at the Executive Branch, 5 C.F.R. § 2635, Subpart B, Gifts from Outside Sources, which provides that "an employee shall not, directly or indirectly, solicit or accept a gift ... [f]rom a prohibited source."5 C.F.R. § 2635.202(a)(1). The regulation defines "gift" as "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value." 5 C.F.R. § 2635.203(b). A "prohibited source" includes "any person who ... does business or seeks to do business with the employee's agency." 5 C.F.R. § 2635.203(d)(2). It also quoted from a VA pamphlet that Dr. Sher had received in 2000 explaining the VA prohibition against soliciting and accepting gifts:

> An employee shall not, except as

> permitted by the Standards of Ethical Conduct, solicit or accept any gift or other item of monetary value....

The pamphlet describes a gift as "[g]enerally, anything of monetary value". *Admin. Record* at 11 (Opinion and Order) [Bate Stamped # 814].

After reviewing the regulation and the pamphlet, the MSPB concluded that "the plain language of the Standards and the explanatory pamphlet are sufficient to put employees on notice that they were not to solicit items of monetary value from companies doing business with the agency, including pharmaceutical companies." *Id.* at 12 [Bate Stamped # 815]. In arriving at its conclusion, the MSPB conceded that the VA "could have done more to prevent the occurrence of this misconduct by more explicitly informing its workforce that soliciting sample drugs was prohibited." *Id.* It reversed because Dr. Sher was "properly charged, the charges were correctly sustained, and as a supervisor, he must be held to a higher standard than other employees." *Id.*

viii. Conclusion

This Court already concluded the MSPB acted properly to the extent it denied the motion for reconsideration under § 1201.119, because it did not have the authority to hear it. To the extent it denied the motion because it did not wish to reopen the record under § 1201.118, Dr. Sher failed to produce evidence that the MSPB abused its discretion. To the extent Dr. Sher's motion asks this Court to amend the record, due to the agency's bad faith or fraud, he has failed to produce any evidence supporting his

allegation and this Court is unwilling to assume it. Finally, the decisions of the ALJ and MSPB contain sufficient information to allow this Court to perform its review obligation without supplementation.

Dr. Sher seeks to make more out of the videotape than can logically be inferred. It is simply a leap too far to conclude that the contents of an Agency training videotape take precedence over the prohibitions of a duly promulgated federal regulation.[8] The sampling culture at the VA may mitigate the penalty, as the ALJ concluded, or it may not, as the MSPB concluded, but it is not a defense to whether the regulation was violated. In sum, the videotape, if admitted, would have been cumulative under any standard of review.

The United States Magistrate Judge filed with the Court on August 4, 2005 her Memorandum of Decision denying Plaintiff's Motion to Amend and granting Defendant's Motion to Strike (Docket # 35). The Petitioner filed his objection to the Memorandum of Decision on August 18, 2005 (Docket # 38) and filed a motion for reconsideration on September 19, 2005 (Docket # 40). This Court has reviewed and considered the Magistrate Judge's Memorandum of Decision, together with the entire record, including

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[8] This argument is similar to the "speeder defense"; that the speeder should not be ticketed, because he and untold numbers of motorists have traditionally exceeded the speed limit on this stretch of road without being ticketed and because others that very day were traveling even faster. Although the defense has a certain sympathetic force, it is rarely, if ever, persuasive.

the submissions of the parties. There is no basis for concluding that the Magistrate Judge's Memorandum of Decision is either clearly erroneous or contrary to law. For the reasons set forth in her Memorandum of Decision and for the additional reasons set forth in this decision, this Court concurs with the recommendations of the United States Magistrate Judge and determines that no further proceeding is necessary.

B. Motion for Judgment

The United States Magistrate Judge filed with the Court on August 4, 2005 her Recommended Decision granting Defendant's Motion for Judgment (Docket # 36). The Petitioner filed his objections to the Recommended Decision on August 18, 2005 (Docket # 38), and filed an amended version of these objections on September 19, 2005 (Docket # 41). This Court has reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record; this Court has made a *de novo* determination of all matters adjudicated by the Magistrate Judge's Recommended Decision; and concurs with the recommendations of the United States Magistrate Judge for the reasons set forth in her Recommended Decision, and determines that no further proceeding is necessary. [9]

III. CONCLUSION

1. It is therefore *ORDERED* that the

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[9] Magistrate Judge Kravchuk's recommendation regarding the discrimination claim requires no further discussion.

Recommended Decision (Docket # 36) and the Memorandum of Decision (Docket # 35) of the Magistrate Judge are hereby *AFFIRMED.*

2. The Plaintiff's Objection to the Magistrate's Recommended Decision Granting Judgment on the Record and Objection to Memorandum Decision Denying Amendment of the Record (Docket # 38) and Amended Objection (Docket # 41) are *OVERRULED.*

3. The Plaintiff's Second Motion for Reconsideration (Docket # 40) is *DENIED.*

4. The Plaintiff's Amended Motion to Amend the Administrative Record (Docket # 21) is *DENIED.*

5. The Defendant's Motion for Judgment (Docket # 9) is *GRANTED.*[10]

SO ORDERED.

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[10] On June 30, 2005, Plaintiff filed a Motion for Oral Argument on all matters then pending before the Court. *Pl.'s Mot. for Oral Arg.* (Docket # 34). Magistrate Judge Kravchuk deferred ruling, *see Recommended Decision* at 2. It is unclear whether Plaintiff presses for oral argument now. If so, this motion is *DENIED,* because the written pleadings are sufficient to allow disposition.

United States District Court, D. Maine.

Alam SHER, Plaintiff,
v.
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, Defendant.

No. Civ. 04-182-B-W.

Aug. 4, 2005.

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR JUDGMENT

KRAVCHUK, Magistrate J.

This case presents an employment discrimination claim and a petition for review of a final order of the Merit System Protection Board (MSPB) that sustained adverse employment measures imposed on the plaintiff-petitioner, Alam Sher, by his employer, the defendant United States Department of Veterans Affairs (VA). Sher asserts that the VA imposed the adverse action on him because of discriminatory animus it harbored toward him based on his Pakistani national origin and his Muslim faith. In addition, Sher challenges the administrative determination of the MSPB based on alleged due process violations. Now before the court is the VA's motion for judgment on the administrative record. (Docket No. 9.) Also before the court is an amended motion by Alam Sher to supplement the administrative record with a certain training videotape (Docket No. 21) and a

corresponding motion by the VA to strike the videotape (Docket No. 23). In a companion Memorandum of Decision, I deny the motion to supplement and grant the motion to strike. Based on the discussion that follows, I recommend herein that the Court grant the VA's case dispositive motion for judgment.

Also pending is Sher's Motion for Oral Argument/Hearing (Docket No. 34). I have issued recommended decisions and orders on the various motions that Sher seeks hearing upon and if appeals or objections are filed on my recommended decisions or orders, the motion for oral argument/hearing can be addressed in the context of those objections/appeals.

JURISDICTION AND STANDARDS OF REVIEW

This dispute falls under the aegis of the Civil Service Reform Act (CSRA). That Act provides for review by the Merit Systems Protection Board (MSPB) of most personnel actions taken by a federal agency against an "employee." *See, e.g.*, 5 U.S.C. §§ 7551 (defining employee), 7513 (concerning "cause and procedure" for adverse employment actions), 7701 (concerning "appellate procedures"). The CSRA also affords employees aggrieved by an adverse employment action a right to seek judicial review of decisions of the MSPB. *Id.* § 7703. Jurisdiction over such an appeal ordinarily lies with the Court of Appeals for the Federal Circuit. *Id.* § 7703(b)(1); *see also Williams v. Rice*, 983 F.2d 177, 180 (10th Cir. 1993). An exception is provided, however, for "[c]ases of discrimination subject to the provisions of section

7702," including claims of discrimination prohibited by section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. *Id.* §§ 7702(a), 7703(b)(2). Such claims may be exhausted at the administrative level *via* alternative administrative processes, including by presentation of the discrimination claim to the MSPB in tandem with a petition for review of the adverse employment action (a so-called "mixed case").[1] *See id.* § 7702; 5 C.F.R. § 1201.151; 29 C.F.R. §§ 1614.302 & 1614.310. Jurisdiction over an appeal taken from a final decision by the MSPB in a mixed case lies in the "appropriate United States District Court." 29 C.F.R. § 1614.310(b); *Kelliher v. Veneman,* 313 F.3d 1270, 1274 (11th Cir. 2002). A final decision from the MSPB on the discrimination component of the mixed case is considered to exhaust the employee's administrative remedies *vis-à-vis* his or her employment discrimination claim. *Chappell v. Chao,* 388 F.3d 1373, 1375 (11th Cir. 2004).

Because this case presents a mixed case relating to federal employment in Maine, this court has jurisdiction to decide the controversy. The standard of review that applies to the non-discrimination claim differs from the standard that applies to the discrimination claim. The non-discrimination claim is to be reviewed based on the administrative record and the MSPB's determination

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[1] "Federal employees with Title VII claims that are not mixed with adverse actions within the MSPB's jurisdiction must file an initial complaint with their agency EEO to pursue their claims." *Chappell v. Chao,* 388 F.3d 1373, 1375 n.2 (11th Cir. 2004).

may be set aside only if it is found to be arbitrary or capricious, is unsupported by substantial evidence, reflects an abuse of discretion, or is otherwise obtained without procedures required by law. *Id.;* 5 U.S.C. § 7703(c). To determine whether such concerns pertain the court "must conduct 'a searching and careful review' of the facts to determine whether 'the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Chem. Mfrs. Ass'n v. U.S. Envtl. Prot. Agency,* 870 F.2d 177, 199 (5th Cir. 1989) (quoting *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). With respect to the discrimination claim, however, the appellant is entitled to a "trial *de novo* by the reviewing court." *Williams,* 983 F.2d at 179-80 (citing 5 U.S.C. § 7703(c)). The "trial *de novo*" concept has been characterized as requiring *"de novo* consideration of all issues of fact underlying [the discrimination claim]," *Young v. West,* No. 97-2066, 1998 U.S.App. LEXIS 12729, *2, 1998 WL 340388, *1 (4th Cir. June 16, 1998) (unpub.op.), so that the claimant is "treated exactly like other Title VII plaintiffs," *id.,* LEXIS at *16, WL at *6.[2] Such equal

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[2] *See also Chandler v. Roudebush,* 425 U.S. 840, 863, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976) (rejecting the contention that federal employees do not have the same right to a trial *de novo* as private-sector employees under Title VII and observing: "The Congress was aware of the fact that federal employees would have the benefit of 'appropriate procedures for an impartial [agency] adjudication of the complain[t],' and yet chose to give employees who had been through those procedures the right to

treatment extends to pretrial discovery, something that was not pursued in this case.[3] *Cf. Washington v. Garrett,* 10 F.3d 1421, 1437-38 (9th Cir. 1993) (affirming district court's discovery orders); *Leach v. Dep't of Treasury,* Civ. A. No. 86-1942, 1987 U.S. Dist. LEXIS 1389, *3-*4, 1987 WL 7198, *2 (E.D. Pa. Feb. 25, 1987) (considering whether to dismiss the plaintiff's case for failure to prosecute where the plaintiff did not conduct any pretrial discovery and failed to file a pretrial memorandum).

FACTS

In support of its "motion for judgment on the record," the VA has utilized the process outlined in Local Rule 56 for developing a summary judgment record without distinguishing between Sher's discrimination and non-discrimination claims. In opposition, Sher has similarly followed summary judgment praxis, denying and qualifying certain of the VA's factual assertions and also presenting additional factual statements in support of his petition for review. Both parties cite the

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file a *de novo* 'civil action' equivalent to that enjoyed by private-sector employees").

[3] In my initial Scheduling Order, I assigned this case to the "administrative track," which effectively prohibited discovery without advance judicial approval. (Jan. 20, 2005, Scheduling Order, Docket No. 6.) The order afforded Sher 10 days in which to object to its provisions. Sher never sought leave to conduct discovery in relation to his discrimination claims.

administrative record in support of their statements with the exception of certain statements that Sher seeks to support by citation to his supplemental affidavit and a VA training videotape discovered by Sher after the completion of the administrative process. In a related Memorandum of Decision on Sher's motion to amend the record (Docket No. 16) and the VA's motion to strike Sher's references to the videotape (Docket No. 22), I have concluded that the "newly discovered" videotape evidence is not properly before the court for purposes of its judicial review of the MSPB's administrative decision on Sher's non-discrimination claims. As for his discrimination claims, I observe that Sher's memorandum in opposition to the VA's motion for judgment does not incorporate the videotape evidence into the presentation of Sher's *prima facie* case or into his discussion of whether the VA's non-discriminatory justifications for demoting him were pretexts for discrimination. (See Pl.'s Opp'n Mem. § IV at 14-20.) Because the videotape evidence is thus targeted exclusively at the question of whether the VA's charges, the adverse action it took against Sher and that MSPB's decision to sustain those measures were arbitrary and capricious, an abuse of discretion or were unsupported by substantial evidence, I have not incorporated that evidence in my discussion. Those questions must first be considered by the MSPB in a petition for review of its initial decision, as explained in the companion Memorandum of Decision on Sher's motion to supplement the record.

Plaintiff Alam Sher's nation of origin is Pakistan and he is a practitioner of the Muslim faith. (Def.'s Statement of Material Facts ¶¶ 1-2, Docket

No. 10.) After an interview, John Sims, the Director of the VA's Togus Medical Center, hired Sher to serve at Togus in the position of Chief Pharmacist. (*Id.* ¶ 3.) The VA describes Sher's qualifications as follows:

> Sher possesses a doctor of pharmacy degree from Creighton University in Omaha, Nebraska. (*Id.*) He is licensed by the State of Pennsylvania. He does not have a license or registration from the federal Drug Enforcement Administration to dispense controlled substances. (*Id.*) He has limited authority to prescribe medicine within the VA facility. He is not authorized to prescribe narcotics. (*Id.*)

Sher started working at Togus on January 2, 1999. (*Id.* ¶ 6.) There are at least three other Pakistanis (two pharmacists and a neurologist) and two other Muslims on the staff at Togus (including a radiologist). (*Id.* ¶ 7; Admin. Record (AR) at 321-22.) In the years that Sher has worked at Togus, he has received high evaluations. (*Id.* ¶ 8.)

Federal regulations generally applicable to all federal agencies provide that public service is a public trust, that federal employees shall not use their public office for private gain, and that, with the exception of, among other things, modest items such as food, refreshment and gifts having less than a $20 value, federal employees shall not accept anything of monetary value from anyone doing business with the employee's agency. (*Id.* ¶ 10, citing 5 C.F.R. §§ 2635.101, .201-204.) Local facilities and units of the VA, such as the Pharmacy of the Togus Medical

Center, develop their own local policies, some of which are extensions or elaborations of government-wide rules or agency-wide rules, regulations and policies. (*Id.* ¶ 11.)

"Sampling" is a practice in which representatives of, or salesmen working for, pharmaceutical companies give providers free samples of their medicines in order, among other things, to better understand the medicines' application and efficacy. (*Id.* ¶ 14.) In June of 2000, Sher experienced chest pain and consulted a cardiologist who suggested that Sher take a statin drug like Lipitor. (*Id.* ¶ 15.) On about June 16, 2000, in order to participate in a Parke-Davis promotional program, Sher signed a Free Goods Requisition Form for Lipitor. (*Id.* ¶ 17.) On about August 16, 2000, Sher signed another Free Goods Requisition Form for Lipitor. (*Id.* ¶ 18.)

On August 6, 1999, Director Sims signed an updated version of a local policy entitled "Pharmaceutical Exhibits and Detail Procedures." Its purpose was "[t]o establish policies and procedures governing pharmaceutical exhibits and activities of representatives of various pharmaceutical firms within the Medical Center." It provided that "[d]ue to federal regulations regarding drug diversion, SAMPLING IS NOT PERMITTED within the Medical Center." (*Id.* ¶ 12.) It is undisputed that Sher was informed of this policy. (*Id.* ¶ 13, citing AR at 298-305.) According to Sher, he interpreted the policy as prohibiting only the distribution of samples to patients or veterans. (AR at 298.) As is recounted below, that was the understanding many medical professionals

(providers) at Togus had of the Center's policy regarding sampling.

In August of 2000, Sher attended training on standards of ethical conduct for government employees that included training on the ethical prohibition against accepting gifts from persons doing business with the agency. (Def.'s Statement ¶ 20.) At that training, attendees were provided with a pamphlet entitled "An Ethics Pamphlet for Executive Branch Employees." It described and explained some of the ethical principles that applied to them. (*Id.* ¶ 21.) Those principles included the principles that "[p]ublic service is a public trust"; that "[a]n employee shall not, except as permitted by the Standards of Ethical Conduct, solicit or accept any gift or other item of monetary value from any person ... doing business with ... the employee's agency"; and that "[e]mployees shall not use public office for private gain." (*Id.* ¶ 22.) The pamphlet explained the rule against gifts from outside sources. Among other things, it explained that "you may not accept a gift from anyone who is giving the gift to you because of your Government position," that "you may not accept a gift from people or organizations who are 'prohibited sources'-those who do business with, or seek to do business with your agency." (*Id.* ¶ 23.) The pamphlet explained that the $20 exception to the general ban on gifts "may be used to accept any gift that is not worth more than $20 ... but not to ask for, something worth $20 or less," and that "there is a $50 per year limit on gifts from the same source." (*Id.* ¶ 24.)

In December of 2000, Sher asked a Pfizer sales representative for samples of Lipitor. (*Id.* ¶ 26.) In

about mid-January of 2001, after a "lunch and learn" program, Sher met the sales representative and asked him for more samples of Lipitor. (*Id.* ¶ 27.) On about January 25, 2001, Sher asked another Pfizer representative for samples of Lipitor. Sher signed a "starter activity form" in order to receive the Lipitor. (*Id.* ¶ 28.) On about January 27, 2001, a Pfizer sales representative provided Sher with 32 10-milligram samples of Lipitor, which amounted to a 56-day supply. (*Id.* ¶ 29.) On about January 29, 2001, another sales representative provided Sher with additional Lipitor samples. (*Id.* ¶ 30.) On January 29, 2001, a Togus employee informed Mr. Schillinger and Togus counsel Carole Moore that Sher had accepted gifts of a large amount of prescription drugs from a pharmaceutical representative. (*Id.* ¶ 31.) On January 29, 2001, at Mr. Schillinger and Ms. Moore's request, Togus security officers stopped Sher as he was leaving Togus and found in his briefcase and in his office 672 10-milligram tablet samples of Lipitor. (*Id.* ¶ 32.)

Following an initial investigation, some aspects of which are discussed in additional detail below, Togus Chief of Staff Timothy Richardson charged Sher with 9 "violations." (*Id.* ¶ 50.) Following the completion of the entire investigation, Director Sims sustained the following 5 charges, identified by the number assigned in the charging instrument:

> (1a.) Misrepresenting himself as a practitioner on free goods requisition forms for Lipitor dated June 16, 2000 and August 16, 2000, in violation of 5 C.F.R. § 2635[.101 *et seq.*], Standards

> of Ethical Conduct for Employees of the Executive Branch;[4]
>
> (1b.) Soliciting samples of Lipitor from a pharmaceutical representative in December 2000, in violation of 5 C.F.R. § 2635;
>
> (1c.) Soliciting samples of Lipitor from a pharmaceutical representative on January 25, 2001, in violation of 5 C.F.R. § 2635;
>
> * * *
>
> (1e.) Receiving and possessing 672 tablet samples of Lipitor on January 29, 2001, in violation of 5 C.F.R. § 2635;
>
> * * *
>
> (1i.) Refusing to provide information to an investigator in connection with an administrative investigation, in violation of 38 U.S.C. § 0.735-12.

(*Id.* ¶¶ 50, 55.) As punishment for the violations Sims imposed a 45-day suspension and demoted Sher from his chief pharmacist position with a corresponding reduction in his pay grade from GS-13 to GS-12. (*Id.* ¶¶ 55, 60; Pl.'s Opposing Statement and Statement of Add'l Facts ("Pl.'s Statement") ¶ 81, Docket No. 29.)

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[4] This charge was sustained only in part. (AR at 392.)

The charge of refusing to provide information to an investigator concerns federal regulations of general application that require federal employees to furnish information with respect to employment and disciplinary matters unless doing so would be self-incriminating. Refusal to do so may be grounds for discipline. (Def.'s Statement ¶ 36, citing 38 C.F.R. § 0.735-12.) On about February 1, 2001, VA Investigator Timothy Bond interviewed Sher and Sher admitted receiving free samples of Lipitor from Pfizer sales representatives. (*Id.* ¶ 37.) By this time, Sher had contacted attorney Sumner Lipman to represent him in the matter. (*Id.* ¶ 38.) VA Investigator Bond presented the case against Dr. Sher to the United States Attorney's Office for the District of Maine for consideration for criminal prosecution, and on March 7, 2001, the U.S. Attorney's Office declined criminal prosecution.[5] (*Id.* ¶ 40.) By letter dated June 28, 2001, Togus Chief of Staff Richardson informed Sher that the U.S. Attorney's Office had declined criminal prosecution, that the issue was now an administrative matter, that Sher was obliged by regulation to cooperate and

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[5] The record does not establish what basis in fact existed for any criminal prosecution. Conceivably, the investigation might have uncovered evidence capable of supporting a prosecution under 18 U.S.C. § 201(b)(2) (prohibiting public officials from seeking or accepting anything of value in return for being influenced in the performance of an official act). However, the VA never charged Sher with being influenced in the performance of his official acts in connection with his solicitation of Lipitor. (Def.'s Statement ¶ 50.)

provide information, that he could be disciplined if he refused, and that Sher should appear for an interview on July 10, 2001. (*Id.* ¶ 41.) Richardson's letter also informed Sher that he was "entitled to a representative of [his] choice." (Pl.'s Statement ¶ 83.) By letter dated July 2, 2001, Sher asked to reschedule the interview because he was scheduled to be on vacation until July 11, 2001, and his attorney Sumner Lipman was unavailable until July 15, 2001. (Def.'s Statement ¶ 42.) A Mr. Schillinger, acting on behalf of Director Sims, rescheduled the interview for July 11, 2001, thereby effectively refusing Sher's request to have his preferred representative present. (*Id.* ¶ 43; Pl.'s Statement ¶ 77.) In his memo to Dr. Sher dated July 2, 2001, Mr. Schillinger reiterated that the U.S. Attorney's Office had declined criminal prosecution, that the issue was now an administrative matter, that Sher was obliged by regulation to cooperate and provide information, and that he could be disciplined if he refused. (Def.'s Statement ¶ 43.) On July 11, 2001, Sher appeared with attorney Keith Varner for an interview with Investigator Bond. (*Id.* ¶ 44.) Agency Counsel Moore attended the meeting. She reiterated that the U.S. Attorney's Office had declined criminal prosecution, and reminded Sher and his attorney Keith Varner (Mr. Lipman's partner) that as a VA employee, Sher was obliged to cooperate with internal investigations and was subject to disciplinary action for refusing to do so. (*Id.* ¶ 45.) Varner asked that the interview be rescheduled to July 13, 2001, to make it possible for Mr. Lipman to attend. Moore declined the request. (Pl.'s Statement ¶ 85.) Mr. Varner also objected to the interview on the grounds that it exposed Sher to

criminal liability. (*Id.* ¶ 46.) In an effort to alleviate Sher and his counsel's concerns, VA counsel Moore offered to and did obtain a letter from the U.S. Attorney's Office for the District of Maine concerning the Office's declination. (*Id.* ¶ 47.) On July 11, First Assistant United States Attorney William H. Browder, Jr., authored a letter to Attorney Varner that stated:

> This is to confirm that on March 7, 2001, this office declined criminal prosecution of Sher in favor of administrative action. The conduct for which Sher was being considered for prosecution was his request and receipt of drug samples (specifically Lipitor) in August of 2000 and in January and February of 2001.

(*Id.* ¶ 48.) After Mr. Varner had a chance to confer by phone with Attorney Lipman, Sher still declined to submit to the interview based upon Mr. Lipman's concern that the U.S. Attorney's declination still left Sher exposed to some risk of criminal prosecution. (*Id.* ¶ 49.) By letter dated September 12, 2001, Sher responded to the VA's charges. Among other things, Sher admitted soliciting sample drugs, and admitted that the Lipitor samples found in his possession were obtained from pharmaceutical company sales representatives. (*Id.* ¶ 54.)

The record reflects that Sher was the only person investigated, charged and disciplined for soliciting and receiving samples. What this means, of course, is that non-Pakistani/non-Muslim providers were not investigated, charged or disciplined with

regard to soliciting or receiving samples.[6] (Pl.'s Statement ¶ 80.) It is uncontested that Sims knew of Sher's national origin. (Def.'s Statement ¶ 4.) There is an evidentiary dispute as to whether Sims knew of Sher's religious faith at the time the investigation was conducted and the disciplinary measures were imposed. If the court were to look exclusively at the portions of the administrative record cited by Sher, it would be forced to conclude that Sher fails to generate a genuine issue of material fact as to whether Sims had knowledge concerning Sher's religious faith.[7] (Pl.'s Statement ¶¶ 5, 86.) Sher asserts that Chief of Staff Richardson, who charged Sims and influenced Sims in regard to his decision, "was admittedly aware of Dr. Sher's Muslim faith." (*Id.* ¶ 86.) However, the cited portion of the record (AR at 146-148, transcribing Sims's testimony) does not support the statement that Richardson had knowledge of Sher's religion or that Richardson communicated that information to Sims. Nevertheless, Sher has now submitted a trial affidavit in which he asserts, evidently for the first time, that he told Sims in 1999 that he was a Muslim and asked Sims for space at the Medical Center to conduct Friday prayers. (*Id.* ¶ 5, citing Supp. Aff. of Alam Sher, Docket No. 29, Elec. Attach # 2.) Thus,

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[6] It also means that the other Pakistani and Muslim providers were not investigated.

[7] Indeed, the ALJ found that the record lacked evidence to support a finding that Sims knew that Sher was a Muslim. (AR at 672.)

for purposes of Sher's trial *de novo* of his discrimination claims, the Court should resolve the dispute in Sher's favor.

Sher also states that he "presented overwhelming and credible evidence that other Chiefs of Service, including Chiefs of Pharmacy, committed the 'same offense.' " (*Id.* ¶ 89.) This statement is conclusory in nature. A review of those portions of the record he cites reflects that it was the case that doctors and pharmacists sometimes received samples for their personal use or the use of other VA personnel, that the witnesses did not consider that there was any need to hide the practice, that there was an interpretation of the sampling policy as prohibiting only distribution of samples to patients and that some witnesses regarded Sher's punishment as their first notice that the practice is against Togus policy.[8] (*See also id.* ¶¶ 92-93.) Sher also fails to generate a genuine issue whether Sims was aware of any other offenses. Indeed, in answering questions about the existence of other Pakistani or Muslim providers at Togus, Sher testified that staff pharmacists and the other providers mentioned would not have any contact with

[8] One witness testified that he was told by pharmaceutical representatives that previous chiefs of pharmacy had taken samples. That statement is hearsay and, although admissible for purposes of the administrative hearing, it is not of evidentiary quality for purposes of Sher's trial *de novo* of his discrimination claims. In any event, as discussed above, there is no evidence that Sims had knowledge of such sampling by prior chiefs of pharmacy, assuming any sampling occurred.

Sims. (AR at 321-322.) Instead of presenting any evidence of Sims's knowledge of sampling, Sher seeks to have the court infer that Sims knew or should have known of other instances of sampling at Togus. According to Sher, nearly a year prior to being charged he informed Chief of Staff Richardson that there was a cupboard full of samples in the VA's Caribou medical center. Sher testified that he brought the samples to Richardson's attention because of the concern that-given the quantity and location of the sample Pharmaceuticals-they would find their way into patient hands. According to Sher, Richardson did not express any surprise at the presence of the samples. (*Id.* ¶ 94.) Sher also testified that he perceived Sims's "attitude, demeanor and conduct" toward him to be hostile. (*Id.* ¶ 96.)

ADMINISTRATIVE FINDINGS

On review, the ALJ and the MSPB both sustained Sims's findings that Sher had committed the violations set forth in charges 1a, 1b, 1c and 1e. (MSPB Opinion and Order, AR at 783-784; ALJ Initial Decision, AR at 651, 653-657.) In its Opinion and Order, the MSPB observed that "[t]he appellant has not challenged the administrative judge's determination to sustain [the charges relating to soliciting and accepting Lipitor] and ... we see no reason to disturb the administrative judge's findings." (AR at 784.)

As for charge li (refusing to provide information to an investigator during an administrative investigation), the ALJ did not sustain it based on his findings and legal analysis (AR at 657-671), but on review the MSPB did sustain

the charge based on its rejection of the ALJ's legal analysis (AR at 785-789). The ALJ and the MSPB also came to differing conclusions about the penalty imposed by Sims. The ALJ declined to sustain Sher's demotion and found that no penalty was called for under the circumstances, based on specific findings that it was the general understanding at Togus that its "Pharmaceutical Exhibits and Detail Procedures" policy prohibited only the distribution of samples to patients and veterans, that Sher's understanding of the policy was consistent with the general understanding, and that it was the general practice and culture at Togus that its providers sought and accepted samples for personal and family use. (AR at 674-689.) The MSPB overturned the ALJ's reversal of the demotion on the following grounds:

> 1. Violations of the gift ban regulation were clearly made out;
>
> 2. Sher attended a training session in August 2000 and received a pamphlet explaining the gift ban;
>
> 3. The plain language of the gift ban, as described in the pamphlet, put Sher on notice that he could not solicit items of monetary value, which the samples plainly were;
>
> 4. Although it may have been common for providers to accept samples for personal use, there was testimony that receipt of a 6-month supply went well beyond the norm;

5. It was reasonable for Sims to hold Sher to a higher standard because Sher was a supervisor;

6. The penalty given was within the VA's table of penalties for a first-time violation of the gift ban; [9] and

7. Sher failed to participate in the VA's investigation after the U.S. Attorney's Office had declined criminal prosecution, which could also independently justify a penalty as severe as removal.[10]

(AR at 792-94.)

DISCUSSION

In his memorandum of law, Sher begins with an argument that "the charges against Dr. Sher ... cannot and must not be sustained" (Pl.'s Opp'n Mem. at 8) based on a newly discovered "crucial piece of evidence that supports Dr. Sher's testimony that solicitation of drug samples from salesmen was acceptable under the policies actually in place at Togus VA." (Pl.'s Opp'n Mem. at 5-6.)[11] Because this

[9] Sher admits this fact. (Pl.'s Statement ¶ 52.)

[10] The MSPB and the ALJ agreed that Sher failed to prove his assertion that he was selectively charged or singled out for punishment based on his national origin or religious belief. (Def.'s Statement ¶¶ 66, 69.)

[11] I observe that the MSPB, in its opinion and order sustaining the VA's findings and disciplinary action, indicated at the outset that "[t]he appellant [Sher] has not challenged the administrative judge's determination to sustain [the charges

argument is premised on newly discovered evidence, which I have excluded from the administrative record, I do not address it herein. (*See* Mem. Dec. on Pl.'s Mot. to Amend Record and Def.'s Mot. to Strike.) Sher's second contention is that the MSPB incorrectly sustained the charge that he refused to provide information in an administrative investigation. (Pl.'s Opp'n Mem. at 8-14.) Sher presents his discrimination claim last. (*Id.* at 15-20.) Like Sher, I address the questions related to his petition for review before turning to the question of whether Sher has generated a genuine issue of material fact in support of his discrimination claim.

A. Judicial Review of the Administrative Action

The scope of judicial review of decisions of the MSPB is circumscribed by statute. In order to overturn the MSPB's disposition of his administrative appeal, Sher must demonstrate that the disposition was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... obtained without procedures required by law, rule, or

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relating to soliciting and accepting Lipitor] and, after reviewing the record, we see no reason to disturb the administrative judge's findings."(AR at 784 ¶ 5.) I am, hence, concerned that this aspect of Sher's petition for judicial review has not been preserved. This concern reinforces my conclusion that Sher's request for the court to consider his newly discovered evidence should be denied until such time as it has been presented to the MSPB through a petition to reconsider its initial decision, pursuant to 5 C.F.R. § 1201.115(d)(1).

regulation having been followed; or ... unsupported by substantial evidence." 5 U.S.C. § 7703(c). Sher contends that the MSPB's decision must be overturned by the court because, as the administrative law judge found, he did not refuse to participate in the VA's investigation. (Pl.'s Opp. Mem. at 8-14.) But his first attack on the decision is that it must be overturned because the VA's failure to produce the training videotape was a "discovery violation and resulted in a fraud upon the board and this court." (*Id.* at 5.) Notably, Sher does not contend that there was no substantial evidence in support of the conclusion that he had violated the gift ban regulation. In fact, the MSPB asserted that Sher did not appeal the ALJ's decision to sustain the charges related to the gift ban violations.

1. Non-production of the videotape during the administrative process generates an issue that is not properly before this court at this juncture.

According to Sher, the VA's failure to produce the videotape in connection with his disciplinary proceeding violated the ALJ's acknowledgement order, which required the VA to tab and file in the administrative record "[c]opies of all other documents which are relevant and material to this appeal." (Pl.'s Opp. Mem. at 6.) Sher further asserts:

> The failure of the [VA] to produce the training videotape ... gravely disadvantaged Dr. Sher at his hearing before the administrative law judge. In particular, the absence of the training videotape prevented counsel for Dr. Sher from cross-examining the [VA's]

> witnesses about the policies at [the] Togus [Medical Center] regarding drug sample solicitation.

(*Id.* at 7.) Sher does not cite any precedent supportive of the proposition that a "discovery" violation of this ilk requires a reversal of the MSPB's determination. As set forth in my Memorandum of Decision on Sher's motion to amend the record and the VA's motion to strike, my independent research reflects that Sher must raise this issue with the MSPB in the first instance, in a "petition for review of initial decision." *See* 5 C.F.R. § 1201.115(d)(1); *see also Wright v. U.S. Postal Serv.,* 183 F.3d 1328, 1332 (Fed. Cir. 1999) (discussing the MSPB's discretion to reopen a matter for further consideration in light of newly discovered evidence); *Lugo v. MSPB,* 128 Fed. Appx. 145, 146 (Fed. Cir. 2005) (unpublished opinion) (describing standard of judicial review that applies to a MSPB decision not to reopen such a matter). Because the significance of the allegedly "newly discovered evidence" is a matter for the MSPB to consider in the first instance in the context of a petition for review of its initial decision in this matter, I conclude that the court should neither "reverse" nor "remand" the MSPB's determination in the context of the instant petition for judicial review.

2. The MSPB's decision to sustain the VA's decision to discipline Sher for refusal to participate in the VA's investigation is supported by substantial evidence and by the law.

The Fifth Amendment privilege against self-incrimination may be asserted in an administrative investigation to protect against any disclosure an

individual reasonably believes could be used in his own criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. United States,* 406 U.S. 441, 444-45, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). In addition, the threat of removal from one's position constitutes coercion, which renders any statements elicited thereby inadmissible in criminal proceedings against the party so coerced. *Garrity v. New Jersey,* 385 U.S. 493, 497, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) ("The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."). Nevertheless, because an employee receives "use immunity" through the so-called Garrity exclusion rule, he may be removed for failure to cooperate with an agency investigation. *Gardner v. Broderick,* 392 U.S. 273, 276, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968). Invocation of the Garrity rule for compelling answers to pertinent questions about the performance of an employee's duties is adequately accomplished when that employee is duly advised of his options to answer under any immunity actually granted or remain silent and face dismissal. *Weston v. Dep't of Hous. & Urban Dev.,* 724 F.2d 943, 948 (Fed.Cir.1983).

***Modrowski v. Dep't of Veterans Affairs,* 252 F.3d 1344, 1350-51 (Fed. Cir. 2001).**

According to Sher, the MSPB's affirmation of charge li (refusing to provide information to an investigator in connection with an administrative investigation, in violation of 38 U.S.C. § 0.735-12) must be reversed because the MSPB's decision "was not supported by substantial evidence and was not in

accordance with the law as set forth in *Modrowski.*" (Pl.'s Opp'n Mem. at 14.) Sher argues that it was inappropriate for the VA to punish him for failing to participate in the interview scheduled for July 11, 2000, because the letter obtained from the U.S. Attorney's Office was ambiguous and "did not foreclose the possibility that Dr. Sher could be prosecuted at a point in the future." (*Id.* at 9.) Sher contends that he was entitled to a specific grant of immunity before he could be expected to participate in the investigation and that he was also entitled to have the interview scheduled for a time when his preferred counsel could be present. (*Id.* at 12-13.) Sher also points to inaccuracies in the letter from the U.S. Attorney, noting that "the letter set forth erroneous dates on which Dr. Sher's solicitation of Lipitor occurred." (*Id.* at 10.) Sher also argues that he was concerned by the fact that Investigator Bond was conducting the interview because he understood Bond to be a criminal investigator. (*Id.* at 10.) The VA argues that once Sher was informed by the First Assistant United States Attorney of that office's declination of prosecution and that the drug solicitation matter was entirely administrative in character, " Dr. Sher could be removed for refusing to provide information." (Def.'s Mot. for J. at 9, Docket No. 9.) The VA also argues that Mr. Lipman's non-availability on the date scheduled for the interview did not require the VA to reschedule the interview or justify Sher's non-participation. (Def.'s Reply Mem. at 4, Docket No. 33.)

In Sher's assessment, his case is like *Modrowski,* in which the Court of Appeals for the Federal Circuit reversed a finding by the MSPB that

the petitioner therein failed to cooperate in a VA investigation. 252 F.3d at 1350-53. The petitioner in that case contended that he was denied an "opportunity to be 'duly advised' of his options to respond to ... questions under the immunity allegedly granted or face dismissal." *Id.* at 1351. The petitioner had received a letter from the VA investigator stating that the U.S. Attorney had declined prosecution and he was ultimately charged and disciplined for failing to participate because he refused to answer questions on two occasions prior to his very first appointment to meet with counsel, scheduled to occur within a week of his receipt of the letter. *Id.* The Court of Appeals concluded that the circumstances made it reasonable for the petitioner to refuse to answer questions prior to meeting with his counsel for the following reasons:

> 1. The letter reporting the U.S. Attorney's declination of prosecution came from the agency, not from the U.S. Attorney's Office;
>
> 2. The letter reported a declination to prosecute the petitioner, but did not set forth "an express grant of immunity;"
>
> 3. The scope of the declination was ambiguous because it covered only two specific real estate transactions and made no mention of theft charges that were the focus of the VA's initial investigation;
>
> 4. The agency had not yet stated that it had discontinued its criminal investigation.

Id. In summation, "[t]he terse language of the letter suggests to us that Modrowski had a reasonable apprehension that any of his responses to [the investigator] made under the supposed grant of immunity with respect to the sale of the houses could nevertheless be used against him in any eventual criminal proceedings concerning theft from, or vandalism to, the houses." *Id.* at 1351-52. Based on the circumstances, the Court of Appeals found that the decision to deny Modrowski a weeks time to consult an attorney prior to participating in the VA's investigation was arbitrary and capricious. *Id.* at 1352.

The VA argues that Sher's case is less like *Modrowski* and more like *Weston v. Department of Housing and Urban Development,* 724 F.2d 943 (Fed. Cir. 1983), in which the Court of Appeals for the Federal Circuit affirmed a decision of the MSPB sustaining disciplinary measure imposed against a federal employee for failing to participate in an investigation. In *Weston,* the petitioner and her counsel met with the agency's inspector general and received a copy of a notice that informed the petitioner that the U.S. Attorney declined criminal prosecution in regard to the topic of the interview and that the matter had become "purely an administrative inquiry." *Id.* at 946. The notice further stated: "Any information or evidence you furnish in response to questions propounded to you during this interview, or any information or evidence which is gained by reason of your answer, may not be used against you in criminal proceedings; however, it may be used against you administratively." *Id.* Based on the advice of her counsel, the petitioner

refused to participate in an interview and was removed from her position with the agency. *Id.* at 946-47. At the first stage of administrative review and on further review by the MSPB, the charge of refusing to participate in the administrative investigation was sustained. *Id.* at 947. On further review by the Court of Appeals, the MSPB decision was affirmed. The Court reasoned:

> The record clearly discloses that at the meeting of February 25, 1981, Ms. Weston and her counsel were in effect advised of the invocation of the *Garrity* rule by the statement distributed and read by Mr. O'Hara. Thus, there is no question that Ms. Weston's refusal then and subsequently to participate in the proposed investigation was not justifiable out of any valid fifth amendment considerations, and the charge of refusing to cooperate during an official HUD inquiry was correctly sustained by the MSPB.
>
> *Id.* at 948.

Sher's case, of course, is distinguishable from both *Modrowski* and *Weston* in important regards. Unlike the petitioner in *Modrowski,* Sher was counseled prior to his refusal to participate in the interview. Indeed, Sher's counsel appear to have focused much of their energy on the question of what kind of warning or promise Sher should demand in consideration for his participation. Also unlike *Modrowski,* Sher actually received a written declination of prosecution from the U.S. Attorney

which indicated that the matter of his Lipitor solicitations would not be the subject of a criminal prosecution. Finally, the VA itself repeatedly informed Sher that it had discontinued its criminal investigation, unlike the agency in *Modrowski*. As for the *Weston* precedent, Sher's circumstance differs in only one significant regard: the Garrity notice he was given did not specifically state that any responses he might give to questioning could not be used against him in any future prosecution.

I conclude that, on balance, it was not an abuse of discretion for the VA to punish Sher for his refusal to participate in the interview scheduled for July 11, 2001, because: (1) Togus Chief of Staff Richardson told Sher more than a week before the interview that the U.S. Attorney had declined prosecution, that the issue was thus entirely administrative in nature, that Sher was obliged by regulation to cooperate and provide information and that he could be disciplined if he refused; (2) Togus Director Sims, through an assistant, reiterated the fact that prosecution had been declined and that Sher could be disciplined for failing to participate in the investigation, also days before the interview; (3) at the commencement of the interview, the VA's counsel reiterated a third time that prosecution had been declined and that he could be disciplined for not cooperating in the investigation; (4) Sher was accompanied to the interview by counsel and also received advice during the meeting from Mr. Lipman by telephone; and (5) reassurance was obtained during the meeting from the U.S. Attorney's Office, *in writing*, that it had declined prosecution in favor of administrative action. In my assessment, the fact

that Sher not only was represented and advised by counsel with regard to the question of whether to participate but also was expressly advised in writing by the U.S. Attorney that there would be no prosecution triggered Sher's regulatory obligation to participate in the VA's investigation. Indeed, I find Sher's plaint about being denied counsel of his choice to be unsubstantiated. The record reflects that on the date of his interview Sher *was* counseled by Mr. Lipman on the question of whether to participate in the VA's investigation. What additional service Mr. Lipman would have afforded during the interview that Mr. Varner could not also have provided-assuming Sher had participated in the interview-is difficult to understand and is nowhere suggested by Sher in his papers. As for Sher's insistence that he receive a Garrity notice with the magic word "immunity" in it, my impression is that the U.S. Attorney's express declination of prosecution actually afforded Sher greater protection than was called for under the Fifth Amendment. Under the Fifth Amendment, Sher was entitled only to "use immunity" for statements provided under the compulsion of disciplinary sanctions. *Kastigar v. United States,* 406 U.S. 441, 453, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *Gardner v. Broderick,* 392 U.S. 273, 276-77, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968). Here the prosecuting authority effectively promised transactional immunity in exchange for Sher's participation. "Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege." *Kastigar,*

406 U.S at 453. Indeed, regardless of whether Sher was expressly educated about "use immunity," it is difficult to imagine that Sher would not receive, in the context of any future prosecution, full use immunity from statements he had made under the threat of possible discharge from employment and in response to assurances from both the complaining agency and the prosecuting authority that a criminal prosecution would not be pursued. *See Garrity,* 285 U.S. at 500 (holding that statements made by a police officer under threat of discharge from office could not be used against him in a future prosecution where he had not signed a waiver of immunity); *Gardner,* 392 U.S. at 278 ("If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, *without being required to waive his immunity* with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, ... the privilege against self-incrimination would not have been a bar to his dismissal.") (citing *Garrity*) (emphasis added and footnote omitted); *see also D'Acquisto v. Washington,* 640 F. Supp. 594, 604, 623 (N.D. Ill. 1986) (involving § 1983 action by police officers challenging department policy of immediately suspending officers who do not cooperate with internal investigations after they are told that the department has no intention of seeking prosecution, but in the absence of assurances that the prosecuting authority has declined prosecution, and observing that prior department practice of suspending non-cooperating officers only after the prosecuting authority had declined prosecution in writing was more than the Fifth Amendment required); *cf.*

McKinley v. City of Mansfield, 404 F.3d 418, 439 n.24 (6th Cir. 2005) ("To comport with *Garrity*, a state employer who compels an employee to make incriminating statements must not only promise not to use those statements in a criminal proceeding against the employee, but must also *keep* that promise.") (addressing employee's § 1983 claim against police officers who allegedly violated his Fifth Amendment rights by wrongfully coercing or inducing statements by means of false Garrity assurances); *In re Kelly*, 350 F. Supp. 1198, 1200 & n. 2 (E.D. Ark. 1972) ("Upon a finding by the court that [a promise of immunity] has been made by the U.S. Attorney, the witness is in no danger of prosecution as a result of his compelled testimony and he has in effect been immunized. This immunity derives from inherent prosecutorial discretion as exerci[s]ed daily. No court could permit the U.S. Attorney or the Justice Department to renege on such a promise ... without running afoul of Constitutional principles.").

In sum, whatever fear Sher and his counsel may have entertained that the U.S. Attorney might, in theory, prosecute Sher in the future for soliciting Lipitor or that Sher might be deemed to have waived his Fifth Amendment rights by answering questions was an unreasonable fear under the circumstances. The prosecuting authority represented in writing that prosecution for violation of the gift ban by soliciting Lipitor was declined and that the matter was therefore administrative in nature. This representation, coupled with the VA's repeated

assurance that it was not seeking a criminal prosecution,[12] was more than sufficient to reassure Sher that his Fifth Amendment rights would not be waived by participation in the investigation and, by extension, justified disciplinary action for his non-participation. I therefore recommend that the court affirm the MSPB's decision to sustain the VA's finding on the refusal to participate charge because it was supported by the evidence and was neither arbitrary nor capricious.[13]

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[12] I consider Sher's stated concern about the First Assistant U.S. Attorney's failure to specifically mention Sher's December 2000 solicitation activity in the letter to be without substance. In context, there is substantial evidence in support of the MSPB's finding that the VA and the prosecuting authority provided Sher with sufficient assurance that he would not be prosecuted for soliciting Lipitor during the relevant timeframe.

[13] The MSPB's reasoning was as follows:

> [T]he letter from the U.S. Attorney's Office was sufficient to provide [Sher] with use immunity from prosecution under the *Garrity* rule based on any statement that he made during any subsequent interview regarding the conduct for which [Sher] was being considered for prosecution. Unlike the circumstances in *Modrowski*, there was no other activity that the agency was investigating. Furthermore, in contrast to the facts in *Modrowski*, the assurance came from the U.S. Attorney and not merely from the agency.
>
> More important, in contrast to the employee in *Modrowski*, who had never spoken to an attorney about the matter, the appellant had access to an attorney. He had the services of his

B. National Origin and Religious Discrimination ("Trial *de novo*")

Sher's claim of discrimination must be evaluated in accordance with the ordinary summary judgment standard. *Kelliher*, 313 F.3d at 1274-1275. "The role of summary judgment is to look behind the facade of the pleadings and assay the parties' proof in order to determine whether a trial is required." *Plumley v. S. Container, Inc.*, 303 F.3d 364, 368 (1st Cir. 2002). A party moving for summary judgment is entitled to judgment in its favor only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and the

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named representative Lipman since February 2000 [*sic*, read 2001]. On July 11, he had the advice of Varner, a licensed attorney, albeit not one experienced in criminal law. Additionally, he had the advice of Lipman by telephone on July 11. Considering these circumstances, we find that the appellant had no right to decline to be interviewed on July 11, and the agency correctly charged him with failing to provide information in an administrative investigation. Accordingly, we sustain the charge.

(AR at 789.)

dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In reviewing the record for a genuine issue of material fact, the Court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. *Merchants Ins. Co. v. United States Fid. & Guar. Co.*, 143 F.3d 5, 7 (1st Cir. 1998). If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial worthy controversy and summary judgment must be denied. *ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002).

Because Sher has not presented any direct evidence of discriminatory animus his discrimination claim must be evaluated according to the burden-shifting paradigm described in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Accordingly, the first order of business is for the plaintiff to establish that he can meet the elements of a *prima facie* case. Should the plaintiff succeed in this endeavor, a presumption of retaliation arises and the evidentiary burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for taking the adverse action against the plaintiff. Once a non-discriminatory rationale is put forward by the defendant, the presumption of discrimination is dispelled and the burden returns to the plaintiff to demonstrate that the defendant's stated rationale is a pretext for discrimination. *Id.* at 802-804.

The VA contends that the MSPB's rejection of Sher's affirmative defense of discrimination must be upheld because there was neither direct nor indirect evidence that Chief of Staff Richardson or Director Sims harbored discriminatory animus toward Sher. (Def.'s Mot. for J. at 5-6.) In response, Sher begins by asserting that the MSPB erroneously found that Sims had no knowledge of Sher's religion. (Pl.'s Opp'n Mem. at 15.) Sher asserts in a supplemental affidavit that Sims knew of his religion because he informed Sims of it in 1999 when he asked Sims for space at the Medical Center for Friday prayers.[14] (Pl.'s Statement ¶ 5, citing Supp'l Aff. of Alam Sher, Docket No. 29, Elec. Attach. # 2.) Based on this supplemental affidavit the court should find that a genuine issue exists whether Sims knew of Sher's religious faith for purposes of Sher's trial *de novo.* However, Sher's supplemental affidavit obviously was not part of the administrative record before the ALJ or the MSPB and the testimony Sher cites from the administrative record does not establish that Sims had knowledge of Sher's religion. There simply is no basis in the administrative record to fault the MSPB's finding on this issue. My *"de novo" McDonnell Douglas* analysis follows.

"Generally, a plaintiff establishes a prima facie case by showing that (1) he is a member of a protected class; (2) he was qualified for the job; (3) the employer took an adverse employment action

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[14] Sher does not suggest that Sims denied the request for a space to conduct Muslim Friday prayers.

against him; and (4) the position remained open or was filled by a person with similar qualifications." *Ugurhan Akturk Kosereis v. Rhode Island,* 331 F.3d 207, 212-13 (1st Cir.2003). The VA does not challenge Sher's ability to satisfy this showing. Accordingly, I turn to the VA's justification for charging and imposing adverse employment measures on Sher. In its memorandum of law the VA asserts as its legitimate, non-discriminatory reason for disciplining Sher the fact that Sher violated "ethical rules governing executive branch employees." (Mot. for J. at 6.) The record supports this assertion. Sher was discovered with 672 individual samples of Lipitor in his possession.[15] Because the VA has put forward a legitimate, non-discriminatory rationale for punishing Sher, the burden returns to Sher to demonstrate that the rationale offered by the VA is a pretext for discrimination and that the totality of the circumstances presented by the record would "enable a rational factfinder reasonably to infer that unlawful discrimination was a determinative factor in the adverse employment action." *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.,* 181 F.3d 15, 22 n.5 (1st Cir. 1999). One of the ways that pretext can be demonstrated is with evidence that the employer's stated rationale was disparately applied. *Chungchi Che v. Mass. Bay Transp. Auth.,* 342 F.3d 31, 39 (1st

[15] The other ethical violation charged by the VA concerns Sher's alleged failure to cooperate in its investigation after the U.S. Attorney's Office declined criminal prosecution. Because that charge is disputed by Sher, I address it in the context of the pretext discussion, below.

Cir. 2003). Sher seeks to build a case for discrimination on the fact that he "presented overwhelming and credible evidence that other Chiefs of Service, including Chiefs of Pharmacy, had committed the 'same offense' as Dr. Sher." (Pl.'s Opp. Mem. at 17, 20.) The record does support a finding that Sher was not the first provider at Togus to engage in sampling for personal use. However, Sher has not demonstrated that Director Sims had knowledge of the personal sampling engaged in by other providers at Togus. Nor does Sher demonstrate that any other providers engaged in the "same offense," insofar as Sher obtained a very substantial quantity of Lipitor, enough to cause another Togus employee to report the matter to Mr. Schillinger and Ms. Moore. Furthermore, even if Sher could demonstrate that either Director Sims or Chief of Staff Richardson were aware of a practice among providers of engaging in personal use sampling, the mere fact that other providers at Togus engaged in personal use sampling does not expose as pretextual the VA's explanation that Sher was charged based on the relatively egregious nature of his sampling (or the appearance of an egregious violation based on the large volume of pills he obtained). Indeed, contrary to Sher's contention, his presentation before the ALJ did not demonstrate that any other provider had committed the "same offense" by volume or by value, much less that either the Chief of Staff or the Director had personal knowledge of such a violation

by another, non-Pakistani or non-Muslim provider at the Togus Medical Center.[16]

In addition to the violation of the gift ban rule, there is the matter of the other "ethical rule" that Sher was found to have violated: the requirement that employees participate in disciplinary investigations when they can do so without incriminating themselves. At pages 19-20 of his opposition brief, where Sher addresses the issue of pretext, he fails to challenge this additional basis for his demotion and reduction in pay. That is problematic because, even if there were a technical obstacle to this court entering a legal finding that Sher violated the rule, that would not necessarily establish that Director Sims's independent determination that the rule was violated was a pretext for discrimination. In any event, my review of the administrative process reflects that the MSPB was correct in its determination that First Assistant United States Attorney William H. Browder's letter

[16] Sher points to testimony at the administrative hearing by certain Togus providers who acknowledged having either engaged in personal use sampling or knowing others who did so. The problem with this "evidence" is that there is no evidence that it was known to Sims at the relevant timeframe when he was deciding the charges brought against Sher or what punishment to impose. Neither party discusses the nature of the hearing that Sher had or might have had within the Togus Medical Center (*i.e.*, before the appeal process). All the court is told is that Sher did not participate in an investigation conducted on July 11, 2001, and subsequently admitted in a letter to the VA that he had solicited the Lipitor samples found in his possession.

declining prosecution, coupled with the VA's repeated assurances that it was not seeking criminal prosecution, was more than adequate assurance that Sher's participation in the VA's investigation would not constitute a waiver of Sher's Fifth Amendment rights.[17] Because there is no direct evidence in the record of discriminatory animus and because Sher fails to generate a trialworthy issue on the existence of animus in his pretext presentation, I conclude that summary judgment should enter against Sher's discrimination claim.

CONCLUSION

Based on the foregoing, I RECOMMEND that the Court GRANT the VA's motion for judgment.

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be

[17] Also relevant to the pretext analysis is the employer's "general policy and practice with respect to minority employment." *Id.* at 804-805. The record demonstrates that Sher's national origin was known to Director Sims when Sher was hired to the chief of pharmacy position and that at least three other Pakistanis are currently employed by the VA at the Togus Medical Center.

filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ALAM SHER, Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS, Agency.

DOCKET NUMBER: BN0752-02-0027-I-2

DATE: September 16, 2004

BEFORE

Neil AG. McPhie, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review, and the appellant has filed a cross petition for review of the initial decision. For the reasons set forth below, we GRANT the agency's petition for review, SUSTAIN the initial decision as to the charges that the administrative judge upheld, but REVERSE the initial decision as to the charge that the administrative judge did not sustain and the penalty determination. We also DENY the cross petition for review. 5 C.F.R. § 1201117.

BACKGROUND

¶2 Effective November 4, 2001, the agency demoted the appellant from his GS-13 Chief of Pharmacy Service position at its facility in Togus,

Maine (Togus), to a GS-12 Clinical Pharmacist position, and suspended him for 45 days, based on charges that he solicited and received free pharmaceuticals in violation of 5 C.F.R. § 2635 and that he refused to provide information relating to an administrative investigation in violation of 38 C.F.R. § O.735-12.[1] MSPB Docket No. BN-0752-02-0027-I-1 Initial Appeal File (IAF 1), Tab 1. He filed this appeal, raising affirmative defenses of discrimination based on religion (Muslim) and national origin (Pakistani). *Id.* The appeal was dismissed without prejudice to allow the parties time to engage in discovery and pursue settlement. IAF 1, Tab 13. After the appeal was refiled, the administrative judge issued an initial decision that sustained the charges of soliciting and receiving free pharmaceuticals, but did not sustain the charge of refusing to provide information in an administrative investigation. The administrative judge further found that the appellant did not establish his affirmative defenses of religious and national origin discrimination. The administrative judge did not affirm the penalty of demotion and suspension, finding that no penalty was warranted under the circumstances of the case. MSPB Docket No. BN-0752-02-0027-J-2 Initial Appeal File (JAF 2), Tab 8.

¶3 On petition for review, the agency asserts that the administrative judge erred in failing to sustain

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[1] It appears that the agency's citation to Title 38 of the U.S. Code in the notice of proposed action was inadvertent and that 38 C.F.R. § 0.735-12 is the correct citation.

the charge of refusing to provide information in an administrative investigation and in finding that no penalty was warranted. The agency also submitted evidence that it provided the appellant with interim relief as ordered in the initial decision. Petition for Review (PfR) File, Tab 1. The appellant responded to the petition for review and filed a cross petition for review, asserting that the administrative judge erred in finding that the appellant did not establish his claims of discrimination. *Id.*, Tab 7. The agency responded in opposition to the cross petition for review. *Id.*, Tab 8.

ANALYSIS

¶4 According to the notice of proposed removal, on June 16 and August 16, 2000, the appellant signed a "Free Goods Requisition" form to receive the drug Lipitor in 10-mg., 20-mg., and 40-mg. doses. In December 2000, he informed a Hospital Representative for Pfizer, Inc., that he was taking 40 mgs. of Lipitor and asked the representative if he had any 40-mg. Lipitor samples. On January 25, 2001, he informed a Pfizer salesman that he was using Lipitor in the 40-mg. dosage and asked if the salesman had some Lipitor for him. On January 29, 2001, agency investigators found, in the appellant's briefcase and his office, 672 10-mg. tablet samples of Lipitor which he had received from the Pfizer hospital representative and the salesman. The agency charged that these actions violated .5 C.F.R. § 2635, Standards of Ethical Conduct for Employees of the Executive Branch, Subparts A and B, General Provisions and Gifts from Outside Sources. IAF 1, Tab 1.

¶5 The administrative judge sustained the charges relating to soliciting and accepting Lipitor based on the appellant's stipulations that he engaged in the conduct as charged, and further based on the administrative judge's findings that the appellant's actions violated 5 C.F.R. part 2635. Initial Decision (ID) at 3-7; Hearing Transcript (HT) at 7-8. In so concluding, the administrative judge found that the Lipitor met the definition of a "gift" and that Pfizer was a "prohibited source," i.e, an entity doing business with the agency. ID at 4-5. The appellant has not challenged the administrative judge's determination to sustain these charges and, after reviewing the record, we see no reason to disturb the administrative judge's findings. Accordingly, the charges pertaining to soliciting and receiving Lipitor are sustained.

The charge of refusing to provide information in an administrative investigation is sustained.

¶6 The agency charged that on July 11, 2001, the appellant refused to provide information to an agent from the agency's Inspector General's office in relation to an administrative investigation, which violated Part O, Standards of Ethical Conduct and Related Responsibilities, Subpart B of 38 [C.F.R.] paragraph 0.735-12. IAF 1, Tab 1. According to the January 30, 2001 report filed by agency police officer Ralph McFee, Human Resources Chief James Schillinger and District Counsel Carol Moore informed the police by telephone that they had received information that the appellant had received a large amount of prescription drugs from a drug representative. The officers investigated and found the appellant in possession of the 672 Lipitor tablets.

The officers filled out an "Evidence or Property Custody Record" form for the drugs. According to the report, the U.S. Attorney was notified, no charges were filed, and the case remained open pending further investigation. IAF 1, Tab 3, Subtab 4(d). Special Agent Timothy Bond from the agency's Office of Inspector General investigated the incident. His April 18, 2001 Report of Investigation cites 18 U.S.C. section 201, part C - Bribery/Gratuity Statutes, as the criminal statute implicated by the appellant's receipt of the Lipitor samples. In a June 18, 2001 Supplemental Report of Investigation, Bond stated that the U.S. Attorney "declined this case for criminal prosecution." *Id.*, Subtab 4(i).

¶7 On June 28, 2001, Chief of Staff Timothy Richardson sent the appellant a memorandum informing him that he was scheduled to be interviewed by Bond on July 10, 2001, that the U.S. Attorney had declined criminal prosecution in the matter before the Inspector General, that the matter was now an administrative investigation, and that he was entitled to a representative of his choice. Richardson quoted from the Code of Federal Regulations:

> Employees will furnish information and testify freely and honestly in cases respecting employment and disciplinary matters. Refusal to testify, concealment of material facts, or willfully inaccurate testimony in connection with an investigation or hearing may be ground for disciplinary action.

Id., Subtab 4(k). In a July 2, 2001 letter in reply, the appellant requested that the interview be rescheduled because he was on annual leave until July 11, and his attorney, Sumner Lipman, was out of his office until July 15. *Id.*, Subtab 4(l). The appellant received a memorandum rescheduling the interview for July 11, and otherwise repeating the information in the June 28 memorandum. *Id.*, Subtab 4(m). Keith Varner, an attorney in practice with Lipman, telephoned Human Resources Chief Schillinger to attempt to reschedule the interview so that Lipman could attend, but had no success. HT at 31-32.

¶8 The appellant appeared for the July 11 interview with Varner. They again protested having the interview without the appellant's designated representative and expressed concern that the appellant could be forced to incriminate himself. HT at 33-34. District Counsel Moore offered to seek a letter from the U.S. Attorney with any language specified by the appellant. HT at 182. The letter was sent by facsimile with the requested language, but the appellant and Varner were not sufficiently reassured. HT at 35-36. The attempted interview was cancelled. HT at 42.

¶9 In *Weston v. Department of Housing & Urban Development*, 724 F.2d 943, 947-48 (Fed. Cir. 1983), the court stated:

> The fifth amendment privilege against compulsory self-incrimination may be asserted in an administrative investigation to protect against any disclosure that an individual

> reasonably believes could be used in his own criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S.Ct. 1653, 1656, 32 L.Ed. 2d 212 (1972). In addition, the threat of removal from one's position constitutes coercion which renders any statements elicited thereby inadmissible in criminal proceedings against the party so coerced. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed. 2d 562 (1967). Nevertheless, when an employee is once granted immunity through this so-called *Garrity* exclusion rule, he may be removed for failure to cooperate with an agency investigation. *Gardner v. Broderick*, 392 U.S. 273, 278, 88 S. Ct. 1913, 1916, 20 L. Ed. 2d. 1082 (1968); *Uniformed Sanitation Men Ass 'n v. Commissioner of Sanitation*, 392 U.S. 280, 284-85, 88 S.Ct. 1917, 19 19-20, 20 L.Ed. 2d 1089 (1968). Invocation of the *Garrity* rule for compelling answers to pertinent questions about the performance of an employee's duties is adequately accomplished when that employee is duly advised of his options to answer under the immunity granted or remain silent and face dismissal.

Weston, 724 F.2d at 947-48. The court applied this analysis to the facts in *Weston* and found that the agency had properly removed the employee for

refusing to cooperate in an agency investigation. *Id.* at 948. The court found it significant that the employee was "informed that (1) criminal prosecution against her had been declined by the United States Attorney, (2) no information gained from the interview could be used against her in a criminal proceeding, and (3) her failure to cooperate could subject her to ... disciplinary action, specifically including removal from employment." *Id.* at 946. The employee in *Weston* had her attorney with her when she received a copy of the statement advising her of her rights, and she declined to answer. *Id.* The court found. that, having been advised of the invocation of the *Garrity* rule, her refusal to participate in the investigation was not justifiable out of any valid fifth amendment considerations and that the charge was correctly sustained. *Id.* at 948.

¶10 More recently, in *Modrowski v. Department of Veterans Affairs,* 252 F.3d 1344 (Fed. Cir. 2001), the court again addressed the application of the *Garrity* rule and found that the scope of the immunity granted to Modrowski was ambiguous because the letter informing him that the U.S. Attorney declined to prosecute was written on agency letterhead, did not expressly grant immunity, and only covered some of the actions that the agency was investigating. *Modrowski,* 252 F.3d at 1351. The court also relied on the fact that Modrowski had no opportunity to meet with his attorney to discuss the letter and the scope of the immunity. *Id.* at 1352. It found that the agency acted arbitrarily and capriciously in charging the appellant with a refusal to cooperate, setting forth these dispositive factors:

> (1) the agency was admittedly investigating Modrowski for criminal violations; (2) the purported grant of immunity had ambiguous scope; (3) statements elicited under the alleged grant of immunity could conceivably be used against Modrowski in related criminal proceedings; (4) there was no formal assurance from the agency that the criminal investigation had terminated; (5) Modrowski was faced with the penalty of removal for failure to cooperate; (6) Modrowski timely arranged to meet with an attorney; and (7) there is no allegation that Modrowski's request was unreasonable.

Id. The court distinguished *Modrowski* from *Weston*, stating that in *Weston* there was no allegation that the scope of protection conferred by the U.S. Attorney's declination to prosecute was ambiguous and the employee had full access to counsel. *Id.* at 1352-53.

¶11 Here, as in *Weston* and *Modrowski*, the agency's inquiry began as a criminal investigation. Also, there was no explicit grant of immunity. However, in the June 28 letter, the agency informed the appellant that the U.S. Attorney "declined criminal prosecution in the matter before the Inspector General" and "[t]he matter is therefore an administrative investigation." IAF I, Tab 3, Subtab 4(k). Thus, the agency informed him that its criminal investigation had terminated. Moreover, the letter sent by facsimile corroborated the agency's statement

that the U.S. Attorney declined to prosecute the appellant. It stated as follows:

> This is to confirm that on March 7, 2001, this office declined criminal prosecution of [the appellant] in favor of administrative action. The conduct for which [the appellant] was being considered for prosecution was his request and receipt of drug samples (specifically Lipitor) in August of 2000 and in January and February of 2001.

Id., Subtab 4(n). The only ambiguity concerns the dates of the misconduct. The letter did not mention the June 2000 "Free Goods Requisition" form, and there were no allegations that the appellant requested or received drug samples in February 2001. The appellant argues that the letter from the U.S. Attorney contains an ambiguity that put him in reasonable fear that he remained subject to prosecution. We disagree.

¶12 We find that the letter from the U.S. Attorney was sufficient to provide the appellant with "use" immunity[2] from prosecution under the *Garrity* rule based on any statement that he made during any subsequent interview regarding "the conduct for which [the appellant] was being considered for prosecution." *Id.* Unlike the circumstances in

[2] "Use" immunity is defined as "[i]mmunity from the use of the compelled testimony (or any information derived from that testimony) in a future prosecution against the witness." Black's Law Dictionary 754 (7th Ed. 1999).

Modrowski, there was no other activity that the agency was investigating. Furthermore, in contrast to the facts in *Modrowski*, the assurance came from the U.S. Attorney and not merely from the agency.

¶13 More important, in contrast to the employee in *Modrowski*, who had never spoken to an attorney about the matter, the appellant had access to an attorney. He had the services of his named representative Lipman since February 2000. On July 11, he had the advice of Varner, a licensed attorney, albeit not one experienced in criminal law. Additionally, he had the advice of Lipman by telephone on July 11. Considering these circumstances, we find that the appellant had no right to decline to be interviewed on July 11, and the agency correctly charged him with failing to provide information in an administrative investigation. Accordingly, we sustain the charge.

The agency's penalty of a demotion and a 45-day suspension is reasonable for the sustained misconduct under the circumstances.

¶14 When the Board sustains all of an agency's charges, it will give deference to the agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to anabuse of discretion." *Parker v. U.S. Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir. 1987); *see Lachance v. Devall*, 178 F.3d 1246, 1251 (Fed. Cir. 1999) (the Board may reject those penalties it finds abusive, but may not infringe on the agency's exclusive domain as workforce manager). This is

because the Board must defer to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. *Stuhlmacher v. U.S. Postal Service,* 89 M.S.P.R. 272, ¶ 20 (2001); *Lewis v. General Services Administration,* 82 M.S.P.R. 259, ¶ *5* (1999). "[I]t is not the Board's function to displace management's responsibility, but to ensure that managerial judgment has been properly exercised." *Lewis,* 82 M.S.P.R. 259, ¶ 5.

¶15 The Board has articulated factors to be considered in determining the propriety of a penalty, such as the nature and seriousness of the offense, the employee's past disciplinary record, the supervisor's confidence in the employee's ability to perform his assigned duties, the consistency of the penalty with the agency's table of penalties, and the consistency of the penalty with those imposed upon other employees for the same or similar offenses. *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 305-06 (1981). The Board places primary importance upon the nature and seriousness of the offense, and its relation to the appellant's duties, position and responsibilities. *Rackers v. Department of Justice,* 79 M.S.P.R. 262, 282 (1998), *aff'd,* 194 F.3d 1336 (Fed. Cir. 1999) (Table). All of the factors will not be pertinent in every instance, and so, the relevant factors must be balanced in each case to arrive at the appropriate penalty. *Douglas,* 5 M.S.P.R. at 306.

¶16 Mitigation of a penalty by the Board is only appropriate where the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness. *Id.* The deciding official need not show that he considered all

the mitigating factors in determining the penalty. *Wynne v. Department of Veterans Affairs,* 75 M.S,P.R. 127, 135 (1997). The Board will independently weigh the relevant factors only if the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding upon a penalty. *Id.* If the penalty is unreasonable, the Board will mitigate it to the maximum reasonable penalty. *Payne v. U.S. Postal Service,* 72 M.S.P.R.646, 651 (1996).

¶ 17 The administrative judge considered the appellant's testimony and the testimony of other witnesses regarding their interpretation of the agency's policy on using sample drugs and the Standards of Ethical Conduct, and what they had seen and done at various agency facilities and in the private sector. The administrative judge concluded that the appellant "could not be faulted for honestly believing that there was absolutely nothing wrong with the practice." ID at 34. The administrative judge further credited the testimony of several witnesses that they did not consider samples of drugs as a gift. ID at 35-36. He found that soliciting and receiving the samples constituted no more than a technical violation of the regulations. ID at 36. The administrative judge noted that the appellant did not request 672 Lipitor tablets, but received that number when, unbeknownst to him, the two Pfizer employees gave him samples on the same day. ID at 36-37. He found that there was no evidence that the agency's reputation or integrity was affected or that any adverse consequence resulted from the appellant's actions. ID at 36. The administrative judge

determined that no penalty was warranted. We do not agree.

¶18 The record reveals that the deciding official properly evaluated the *Douglas* factors. Specifically, he considered the appellant's years of service, his past work record, his job as a supervisor, his contacts with the public, the seriousness of the offenses, the fact that the appellant was in a position of trust, the consistency of the penalty with those imposed on others and with the agency's table of penalties, that the appellant was on notice regarding the rules that were violated, his potential for rehabilitation, and the mitigating or extenuating circumstances presented by the appellant. IAF 1, Tab 1; HT at 125-26, 135-39, 156-57. After considering these factors, the deciding official mitigated the appellant's proposed removal to a demotion and a 45-day suspension. lAF 1, Tab 1; HT at 137-38, 140. Because the agency considered the mitigating factors in this matter, the Board need not independently weigh them. *Wynne,* 75 M.S.P.R. at 135. We must still determine, however, whether the penalty was reasonable.

¶19 The regulation at issue, Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635, Subpart B, Gifts from Outside Sources, under which the agency charged the appellant, provides that "an employee shall not, directly or indirectly, solicit or accept a gift . . . [fjrom a prohibited source."[3] 5 C.F.R. § 2635.202(a)(1). A "gift"

[3] An employee may accept an unsolicited gift of $20 or less in value "per source per occasion, provided that the aggregate

is defined as "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value." 5 C.F.R. § 2635.203(b). A "prohibited source" includes "any person who ... does business or seeks to do business with the employee's agency." 5 C.F.R. § 2635.203(d)(2).

The record shows that the appellant attended a training session on the Standards of Ethical Conduct and received a pamphlet explaining those Standards generally in August 2000. IAF 1, Tab 3, Subtab 4(f). The agency submitted a copy of the pamphlet that was distributed at the training session. Among the fourteen Principles of Ethical Conduct for Federal Employees set forth in the pamphlet is the following: "An employee shall not, except as permitted by the Standards of Ethical Conduct, solicit or accept any gift or other item of monetary value ...." *Id.* at 5. The pamphlet describes a gift as "[g]enerally, anything of monetary value." *Id.* at 7. The pamphlet further gives examples of unsolicited gifts that may be accepted, including a $15 pen from a person whose license application the employee is processing, a birthday gift from a brother, and tickets worth $16 to a show from a company that applied to the agency for

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market value of individual gifts received from any one person under the authority of this paragraph shall not exceed $50 in a calendar year." 5 C.F.R. § 2635.204(a). The appellant has not denied that he solicited the sample Lipitor tablets. Thus, the $20 exception does not apply.

a grant. *Id.* at 7-8. The pamphlet does not specifically mention drug samples or samples of any kind from a company doing business with the agency. Additionally, witnesses testified without exception that they did not recall the ethics training session including any information that such gifts were prohibited. Even so, we find that the plain language of the Standards and the explanatory pamphlet are sufficient to put employees on notice that they were not to solicit items of monetary value from companies doing business with the agency, including pharmaceutical companies.

¶21 Several witnesses also testified that they were aware of occasions when employees accepted sample drugs, and did not believe doing so was prohibited if the drugs were for personal use, rather than for patients. *See* HT at 199-201, 212-14, 218-19, 225-31, 246, 250, 252, 255-56, 267-68, 279, 281-82. However, Doctor Philip Amidon, formerly a gastroenterologist at Togus, testified that he could not imagine someone receiving enough drug samples for a 6-month supply, which is approximately the amount the appellant received. HT at 282.

¶22 The agency could have done more to prevent the occurrence of this misconduct by more explicitly informing its workforce that soliciting sample drugs was prohibited. Nevertheless, the appellant was properly charged, the charges were correctly sustained, and as a supervisor, he must be held to a higher standard than other employees. *See Myers v. Department of Agriculture*, 88 M.S.P.R. 565, ¶ 34 (2001).

¶23 The agency's table of penalties provides that a penalty from a reprimand to a removal is appropriate for a first offense of accepting gifts or gratuities from individuals or firms doing business or having contractual relations with the agency. IAF I, Tab 3, Subtab 3. Additionally, the United States Court of Appeals for the Federal Circuit has held that removal is warranted when an employee fails to participate in an agency investigation when, as here, criminal prosecution had already been declined. *Weston,* 724 F.2d at 946-48. Further, the Board has found removal to be a reasonable penalty where the appellant improperly accepted cash payments and interfered with a an official investigation, despite his 17 years of federal service and lack of prior discipline. *Hayes v. Department of Labor,* 65 M.S.P.R. 214, 2 19-20 (1994). Considering the circumstances of this matter, and the relevant case law, we find that a demotion and 45-day suspension is a reasonable penalty for the appellant's misconduct.

The administrative judge correctly found that the appellant did not establish his affirmative defenses of discrimination based on reljgion an national origin.

¶ 24 The administrative judge determined that the appellant did not establish his affirmative defense of discrimination based on his religion (Muslim) because he presented no evidence that the deciding official, Director John Sims, knew that he was Muslim before the appellant filed this appeal. ID at 22. In his cross petition for review, the appellant argues that the administrative judge erred in this regard because proposing official Richardson, who knew that the appellant was Muslim, was the driving force behind

the investigation and the discipline. PfR File, Tab 7. The appellant is correct that the actions of the proposing official may support a finding of discrimination. *See Arredondo v. US. Postal Service*, 85 M.S.P.R. 113, ¶~J 13-15 (2000). Nevertheless, the appellant presented no evidence, either direct or indirect, that Richardson proposed discipline because of hostility toward the appellant's religion. We find that the evidence does not support a finding that Richardson specifically targeted the appellant. According to their report, agency police officers investigated the appellant after they received a telephone call from Human Resources Chief Schillinger and District Counsel Moore. When the officers found the drugs in the appellant's briefcase and his office, they turned the drugs over to Bond on February 1. IAF I, Tab 3, Subtab 4(d). Bond interviewed the appellant that day. *Id.*, Subtab 4(i). The appellant has presented no evidence, nor has he even alleged, that Richardson was the one who informed Schillinger and Moore about the drugs, thus beginning this investigation. Likewise, there is no allegation that Richardson decided to involve the Inspector General in the matter. Richardson's first involvement seems to have occurred when Bond issued his report, after which time Richardson scheduled the interview with Bond. These facts do not support the appellant's assertion that Richardson was the driving force behind the investigation.

¶25 Although the appellant argues that the agency has not taken similar actions against non-Muslim employees, the appellant has not identified any similarly situated employees who were not Muslim and were not disciplined. Deciding official Sims

testified that he did not know the identity of any other employees who were using sample drugs. HT at 145. The appellant argues that Richardson knew that drug samples were plentiful at Togus because he himself informed Richardson that the "cupboard" at the agency's facility in Caribou, Maine, was full of sample drugs. HT at 307-10. The appellant did not testify that he told Richardson who was using the drugs. In fact, he did not testify that anyone was using them or that anyone had solicited them. The agency asked the appellant to identify others who used sample drugs in the course of the investigation that led to these charges, but the appellant refused to name anyone. Given that circumstance, we see no significance in the fact that no one else was disciplined for this misconduct. Furthermore, although witnesses testified that use of sample drugs was common at Togus, none of the witnesses testified that other employees solicited drugs from drug companies or accepted drugs in the quantity that the appellant did.

¶26 For the same reasons, we agree with the administrative judge that the appellant did not show that national origin discrimination was the basis for the discipline. As evidence of hostility toward Pakistani nationals, the appellant described remarks made by former Chief of Staff Douglas Holyoke some time between 1996 and 1998 in the course of filling a vacancy. According to the appellant, he was a part of a search committee which recommended offering theposition to an individual of Pakistani origin. Holyoke, after interviewing the applicant, said to the appellant, "These guys are a dime a dozen. Why did you choose him?" HT at 277. The position was never

filled. The administrative judge limited the testimony about this incident because he found that Holyoke's alleged animus toward Pakistanis did not prove that Sims or Richardson were similarly hostile. We agree that the offer of proof was too removed from the instant case to be relevant. As for the appellant's other claims that Sims was particularly hostile to him and denied him a retention bonus, he made no offer of proof that would connect these assertions, even if true, to animus because of the appellant's Pakistani background.

ORDER

¶27 For the foregoing reasons, we SUSTAIN the agency's charges against the appellant, and its penalty determination. The cross petition for review is DENIED. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201. 113(c) (5 C.F.R. § 120l.l13(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(l) (5 U.S.C. § 7702(b)(l)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission

Office of Federal Operations

P.O. Box 19848

Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the

Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: /s Bentley M. Roberts, Jr.
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON FIELD OFFICE

ALAM SHER, Apellant

v.

DEPARTMENT OF VETERAN'S AFFAIRS, Agency

DOCKET NUMBER: BN-0752-02-0027-I-2

DATE: September 30, 20002

BEFORE
William Carroll
Chief Administrative Judge

INITIAL DECISION

The appellant appeals his reduction in grade and pay from the position of Supervisory Pharmacist, GS-0660-13, Step 10, $86,025 per annum, to that of Pharmacist (Clinical Specialist), GS-0660-12, Step 10, $78,756 per annum, and a suspension of *45* days, both effective November 11, 2001.[1] The Board has

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[1] On April 15, 2002, the above-captioned appeal was automatically refiled per a February 15, 2002 initial decision

jurisdiction over the employee and the matter appealed. *See* 5 U.S.C. §§ 7701(a), 7511(a)(1)(A), 75 12(2), (3), and (4) and 7513(d). I held a hearing in this appeal on May 6 and 7, 2002 in Togus, Maine. For the reasons set forth below, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

By letter received by the appellant on August 21, 2001, Timothy J. Richardson, M.D., Chief of Staff, Togus Medical & Regional Office Center ("Togus Center"), proposed to remove the appellant based on nine lettered charges, 1a through 1i. *See* Initial Appeal File (IAF), Tab 1, Attch. The appellant replied to the proposal in writing on September 12, 2001. *See* Refiled Appeal File (RAF), Tab 5, Appellant's Exhibit G.[2] By letter dated October 22, 2001, John H. Sims, Jr., Togus Center Director, issued a decision on the proposed removal sustaining reason la in part and dismissing it in part and sustaining reasons 1b, 1c, 1e, and 1i. By implication,

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dismissing without prejudice the appellant's original timely filed appeal of December 7, 2001. *See Sher v: Department of Veterans Affairs*, MSPB Dkt. No. BN-0752-02-002711 (Initial Decision, Feb. 15, 2002).

[2] Although at hearing I stated that I would include the then-submitted written reply with the previously submitted agency response file, I now find it less confusing to include it as a separate hearing exhibit. Thus, it is hereby accepted into evidence as Appellant's Exhibit G.

later verified, Sims found reasons 1d, 1f, 1g, and 1h not sustained.[3] *See* IAF, Tab 1, Attch. Sims further found that a reduction in grade and pay, i.e., demotion, and a 45-day suspension were the appropriate penalties for the sustained charges and set an effective date of November 11, 2001.

The parties' respective burdens of proof

To sustain an adverse action, *e.g.*, demotion, suspension, before the Board, an agency must establish, by a preponderance of the evidehce,[4] that there is a factual basis for the conduct charged and that some disciplinary action, based on the proven conduct, would normally be warranted to promote the efficiency of the service. *See* 5 U.S.C. §§ 75 13(a) and 770 l(c)(1)(B); *see also Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 302-03, 306 n.67, 307-08 (1981). The "efficiency of the service" requirement includes a showing that there is a connection, i.e., nexus, between the charges and service efficiency and that the particular penalty chosen is within the bounds of reasonableness. Thus, three distinct elements must he proven in any adverse action case. *Id.*

Moreover, even if otherwise proper, an adverse action may not be sustained if an appellant shows,

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[3] These non-sustained charges will not be further considered in this initial decision.

[4] A preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would a~ccept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

inter alia, a prohibited personnel practice, e.g., discrimination, in the decision to take the action. 5 U.S.C. § 7701(c)(2)(B); 5 C.F.R. § 1201.56(b)(2). When, as here, the appellant raises an issue of discrimination,[5] this is an affirmative defense for which he has the burden of proof by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(iii).

Charge 1a is sustained.

The part of this charge to be considered in this appeal[6] specifies that on June 16, 2000 and August 16, 2000, the appellant signed Free Goods Requisition Forms to receive the drug Lipitor in dosages of 10 mgs, 20 mgs, and 40 mgs in violation of 5 C.F.R, Part 2635, Subpart A, Standards of Ethical Conduct for Employees of the Executive Branch--General Provisions.[7] *See* IAF, Tab 1, Attch. The appellant stipulated that he signed the requisition forms on those dates. *See* HT at 7. A stipulation to a matter of fact satisfies the agency's burden of proving that fact. 5 C.F.R. § 1201.63; *Swift v. Office of Personnel Management,* 48 M.S.P.R. 441, 445 (1991). Thus, I

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[5] The appellant alleged that his demotion and suspension were caused by discrimination based on his religion, Muslim, and his national origin, Pakistani.

[6] The agency representative clarified that the part of charge 1a that Sims dismissed his involved the appellant's alleged misrepresentation of himself as a practitioner and use of an invalid DEA number. *See* Hearing Transcript (HT) at 6.

[7] Inexplicably, this charge, unlike similar charges 1b, 1c, and 1e, did not include an alleged violation of Subpart B of Part 2635, Gifts from Outside Sources.

find that the agency has proved by a preponderance of the evidence that the appellant, on June 16, 2000 and August 16, 2000, signed Free Goods Requisition Forms to receive Lipitor in dosages of 10 mgs, 20 mgs, and 40 mgs. *See* IAF, Tab 3-4j (completed forms). The issue thus becomes whether these actions violated 5 C.F.R. Part 2635, Subpart A.

The section of Subpart A applicable here is 5 C.F.R. § 2635.101(b)(4) which states as follows:

> An employee shall not, except as permitted by subpart B of this part, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or non-performance of the employee's duties.

"Gift" is not defined in Subpart A but is later defined in Subpart B, at 5 C.F.R. § 2635.203(h), *inter alia,* as follows:

> *Gift* includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value.[8]

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[8] There are many items specifically indicated in the regulation not to be "gifts," none of which applies here.

I note that in 5 C.F.R. § 2635.203(b) the definition of "gift" applies only "[for purposes of this subpart," i.e., Subpart B. Thus, technically the definition is not applicable to the concept of "gift" as used in Subpart A's 5 C.F.R. § 2635. 101(b)(4).[9] However, the appellant argued no other definition of "gift" which would make him less culpable and I can find none that would more sensibly apply, redundancy aside, than that contained in 5 C.F.R. § 2635.203(b).

Using this definition then, I find that the Lipitor the appellant solicited on June 16, 2000 and August 16, 2000 was a "gift" as it is an item of monetary value.[10] Further, I find, with no argument to the contrary, that no exception from Subpart B applies to the appellant's circumstances and that the pharmaceutical company to which the Free Goods Requisition Forms were forwarded is obviously an entity doing business with or conducting activities

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[9] This could explain 5 C.F.R. § 2635.101(b)(4)'s wording of "gift or other item of monetary value." The definition of "gift" in 5 C.F.R. § 2635.203(b) includes an "item having monetary value." Thus, there is a needless redundancy of "item of monetary value." I find no harm in this redundancy because it is otherwise clear that one is forbidden from soliciting an item of monetary value no matter whether it is considered a "gift" or an item of monetary value.

[10] Except for some evidence proffered to show that the Lipitor the appellant solicited (and later received, *see* text *infra)* was of little or no value to the pharmaceutical company representatives who were solicited, the appellant did not argue that these drugs were not "items having monetary value."

regulated by the Department of Veterans Affairs. Consequently, I find that the appellant's solicitation was in violation of 5 C.F.R. 2635, Subpart A, as charged. Charge 1a is thus sustained.

Charge 1b is sustained.

This charge specifies that on two occasions in December 2000, the appellant advised a pharmaceutical company representative that he was "on 40 mg of Lipitor and asked if he could get [him] some," in violation of 5 C.F.R. Part 2635, Subparts A and B. *See* IAF, Tab 1, Attch. In essence, I find, as in charge 1a, that the agency's charge is one of solicitation of a gift.

The appellant stipulated that he solicited the Lipitor 40 mg from the pharmaceutical compavv representative on the two occasions in December 2000. *See* HT at 7. Based on the stipulation, I find that the agency has proved by a preponderance of the evidence that the appellant on these two occasions solicited Lipitor 40 mg from a pharmaceutical company representative, For the same reasons I found in charge 1a,[11] I find here that the appellant's solicitation on two occasions in December 2000 was a violation of 5 C.F.R. Part 2635, Subparts A and B, as charged. Charge 1b is thus sustained. *See* 5 C.F.R. §~ 2635. 10l(b)(4), .20 I, .202(a), and .203(b).

Charge 1c is sustained.

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[11] Except that here the solicitation was done in person and not by means of a form.

This charge specifies that on or about January *25,* 2001 the appellant advised a (different) plarmaceutical company representative that he was "using Lip itor 40 mg and asked if the salesman had some Lipitor for [him]" in violation of 5 C.F.R. Part 2635, Subparts A and B. *See* IAF, Tab 1, Attch.

The appellant stipulated that he solicited the Lipitor 40 mg from the pharmaceutical company representative on January 25, 2001. *See* HT at 7-8. Based on the stipulation, I find that the agency has proved by a preponderance of the evidence that on January 25, 2001 the appellant solicited Lipitor 40 mg from a pharmaceutical company representative. In addition, for the same reasons I found in the previous two charges, I find here that the appellant's solicitation on January 25, 2001 was in violation of 5 C.F.R. Part 2635, Subparts A and B, as charged. Charge ic is this sustained. *See* 5 C.F.R. §§ 2635.101(b)(4), .201, .202(a), and .203(b).

Charge 1e is sustained

This charge specifies that on or about January 29, 2001 the appellant was found in possession of 672 tablet samples of Lipitor received from a pharmaceutical company representative in violation of 5 C.F.R. Part 2635, Subparts A and B. *See* IAF, Tab 1, Attch.

The appellant stipulated that he received 672 Lipitor tablet samples on January 29, 2001 from two

pharmaceutical company representatives.[12] *See* HT at 8. Based on the stipulation, I find that the agency has proved by a preponderance of the evidence that on January 29, 2001 the appellant received 672 Lipitor tablet samples from pharmaceutical company representatives. Moreover, the only difference between this charge and the three previously sustained charges is that here the wrongful activity is not the solicitation of the Lipitor, but the actual acceptance or receipt of it. From a review of 5 C.F.R. §~ 2635.l0l(b)(4), it is clear that acceptance of a gift, as I have found the Lipitor tablets are, is proscribed. Consequently, I find that the appellant's acceptance of this gift was in violation of 5 C.F.R. § 2635, Subparts A and B, as charged. Charge le is thus sustained. *See* 5 C.F.R. §§ 2635.10l(b)(4), .201, .202(a), and .203(b).

Charge 1i is not sustained.

This charge specifies that on July 11, 2001 the appellant refused to provide information to an agent of the agency's Inspector General's office in relation to an administrative investigation in violation of 38 U.S.C. *(sic* C.F.R.), Part O, Subpart B, § 0.735.12, Standards of Ethical Conduct and Related Responsibilities. *See* IAF, Tab 1, Attch. The pertinent part of that regulation states, at subsection (b):

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[12] The agency's error in alleging that all 672 drug samples came from one, rather than two, pharmaceutical company representatives is deemed minor and therefore harmless.

> Employees will furnish information and testify freely and honestly in cases respecting employment and disciplinary matters. Refusal to testify ... in connection with an investigation ... may be ground for disciplinary action. An employee, however, will not be required to give testimony against himself ... in any matter in which there is an indication that lie ... may be or is involved in a violation of law wherein there a possibility of self-incrimination.

There is no dispute (1) that on July 11, 2001 an agent of the agency's Inspector General's office made the appellant aware of the above regulation, i.e., his obligation to provide information, and told him discipline would be taken if he did not do so and (2) that on July 11, 2001 the appellant refused to provide information to that agent, on his counsel's advice. The issue for resolution here, similar to the first four charges, is whether this refusal was in violation of a regulation, here 38 C.F.R. § 0.735.12. In other words, if the appellant should not .have been required under the circumstances as presented themselves on July 11, 2001 to provide information to the agent, then he did not violate this regulation and the charge cannot be sustained.[13]

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[13] Either that or the, agency could be found to have been arbitrary and capricious in charging the appellant with a refusal to provide information as the U.S. Court of Appeals for the Federal Circuit found in a recent case. *See* text *infra*.

The U.S. Court of Appeals for the Federal Circuit addressed the issue of refusal to cooperate in an agency investigation[14] in *Modrowski v. Department of Veterans Affairs*, 252 F.3d 1344 (Fed. Cir. 2001).[15] The framework for analyzing a charge of refusal to cooperate is set forth in *Modrowski* as follows:

> The Fifth Amendment privilege against self-incrimination may be asserted in an administrative investigation to protect against any disclosure an individual reasonably believes could be used in his own criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). In addition, the threat of removal from one's position constitutes coercion, which renders any statements elicited thereby inadmissible in criminal proceedings against the party so coerced. *Garrity v.*

[14] A refusal to cooperate is tantamount to a refusal to provide information or a refusal to answer questions. These terms will be used interchangeably in this initial decision.

[15] Ironically, *Modrowski* involves the same agency as here and was issued at the very time, June 13, 2001, that events in this case were unfolding. For an analysis of *Modrowski* from a practitioner's viewpoint, *see* William N. Rudman, *When Employees Take the Fifth*, Government Executive (magazine), June 2002.

> *New Jersey,* 385 U:S. 493, 497, 500 (1967) ("The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of tree choice to speak out or to remain silent."). Nevertheless, because an employee receives "use immunity" through the so-called *Garrity* exclusion rule, he may be removed for failure to cooperate with an agency investigation. *Gardner v. Broderick,* 392 U.S. 273, 276 (1968). Invocation of the *Garrity* rule for compelling answers to pertinent questions about the performance of an employee's duties is adequately accomplished when that employee is duly advised of his options to answer under any immunity actually granted or remain silent and face dismissal. *Weston v. Dep't of Hous. & Urban Dev.,* 724 F.2d 943, 948 (Fed. Cir. 1983).
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> *Id.* at 1350-51.

The appellant in *Modrowski* refused on two occasions, July 31, 1997 and August 6, 1997, to ans~ver questions posed to him by an agency investigator about certain criminal and/or ethical violations. He asserted that he never had the opportunity to be duly advised of his options to respond to the investigator's questions under the inimunity allegedly granted or face dismissal. *Id.* at 1351. On July 31, 1997, one day after receiving the investigator's letter to respond, Modrowski refused to respond to questions because he had "many questions regarding the immunity issue;" he "had no idea of the

scope of said immunity." *Id.* He arranged to meet with his attorney on August 8, 1997. He justified his refusal to answer the investigator's questions on August 6, 1997 by arguing that he should not have to respond until after consultation with his attorney, 2 days later. The court ruled that Modrowski's legal rights in the case were far from clear cut.

Further, the court noted that there were other matters at issue, potentially criminal, besides the. orte mentioned in the investigator's letter informing the appellant of the U.S. Attorney's declination to prosecute. Thus, the court found considerable ambiguity in the scope of the alleged immunity. The terse language of the letter suggested to the court that Modrowski had a reasonable apprehension that any of his responses to the investigator made under the supposed grant of immunity with respect to the criminal matters mentioned in the letter could nevertheless be used against him in any eventual proceedings concerning related, and potentially criminal matters. Further, the agency noted that the agency did not explain why Modrowski's request could not be accommodated.

The court concluded that the agency made an arbitrary and capricious decision that unfairly denied Modrowski the opportunity to consult with his attorney. It thus found it was arbitrary and capricious to charge him with a refusal to cooperate. The court distinguished the case from *Weston v.Department of Housing & Urban Development*, 724 F.2d 943 (Fed. Cir. 1983) where there was no allegation that the scope of protection conferred by the U.S. Attorney's declination to prosecute was

ambiguous and the employee had full access to counsel.

The appellant here argued in his closing summation that his case was "far more egregious" than *Modrowski*. HT at 359.

The following facts about the events before July 11, 2001 in the instant case are necessary to put the events of that date in perspective. *See generally* IAF, Tab 3, Subtabs 4i and 4j (investigative reports) and the testimonies of the appellant, Bond, Moore, Schillinger, and Varner.

The appellant was apprehended by the agency's police/security force on January 29, 2001 with the Lipitor samples and shortly thereafter a criminal investigation was begun by the Inspector General's office. Criminal Investigator Timothy R. Bond first interviewed the appellant on February 1, 2001. At that time Bond was conducting a criminal investigation, one that could ultimately be relied on by the U.S. Attorney in prosecuting the appellant criminally. By February 1, 2001, the appellant had retained an attorney, Sumner H. Lipman, a partner in the law firm Lipman & Katz, PA., Augusta, Maine. Lipman, who has criminal law expertise. has remained the appellant's attorney to date.

On February 1, 2001, the appellant ultimately decided that he would talk to Bond without Lipmad present.[16] Thereafter, in Bond's "Report of

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[16] The appellant alleged procedural error with respect to this interview, and other matters, relative to which, he argued, the

Investigation" dated April 18, 2001, Bond set forth sufficient facts upon which a reasonable person could conclude that the appellant had violated certain ethical standards. *See* IAF, Tab 3, Subtap 4.~ Indeed, this report and a later supplemental report, *see infra*, with their attachments, served as the primary basis for eventually bringing adverse action charges against the appellant.

In his report, Bond noted the appellant's June 16, 2000 and January 2001 solicitations and January 2001 receipt of Lipitor. He did not note the two December 2000 solicitations although these are mentioned in one of the attachments to the report, a Memorandum of Interview of one of the pharmaceutical company representatives. Also in his report, and most importantly for the instant charge, Bond stated that the "United States Attorney's Office, District of Maine, declined this case for criminal prosecution,"[17] It is clear from that letter that this

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agency had denied him effective assistance of counsel. *See* RAF, Tab Appellant's Exhibits A, B, and C (letters of complaint from Lipman to Bond). I ruled that his stipulation of facts in charges 1a, 1b, 1c, and 1e had negated his allegation of denial of effective assistance of counsel. Thus, it was unnecessary to reach thi~. issue in those charges. HT at 15. In the instant charge I will be analyzing whether the appellant was denied the effective assistance of counsel as an issue in ultimately determining whether to sustain the merits of the charge.

[17] Any prosecution would most assuredly have been under the authority of 18 U.S.C. § 201(c)(l)(B), Bribery of Public Officials

declination was made on March 7, 2001. It was apparently orally conveyed by the U.S. Attorney's Office to Bond on that date. When the U.S. Attorney's Office declined to prosecute, this meant to Bond, per custom, that his investigation turned from a criminal one to an administrative one.

Bond's "Supplemental Report of Investigation" dated June 18, 2001 reported that Bond had received additional information showing that the appellant had solicited Lipitor on yet another occasion, in August 2000,[18] *See* IAF, Tab 3, Subtab 4j. Bond testified that he filed this supplemental report with Sims's office "because it contains information relative to the administrative investigation." HT at 79. He did not file it with the U.S. Attorney's Office. *Id.* Thus, that office apparently never learned of this additional transgression on the appellant's part.

Bond further testified that even though no criminal action was to be taken, he stayed involved in the case after his reports in the event the "facility," i.e., management at the Togus Center, decided it would initiate adverse action against the appellant.

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and Witnesses, as alluded to by Bond in his report. This section provides for a fine and imprisonment for not more than 2 years, or both, for a violation.

[18] There was some dispute about whether Bond had attempted to interview or actually interviewed the appellant in March 2001 and/or June 5, 2001 in apparent conjunction with this matter. I find it unnecessary to resolve such dispute.

In such a situation, Bond testified, he would be customarily called upon to conduct an administrative interview of the subject employee. HT at 58-59. Such was true here and an interview was first scheduled for July 10, 2001. It is noted that Bond's office is not at the Togus Center but is in Massachusetts, about 2 1/2 hours driving time from the Togus Center.

Chief of Staff Richardson scheduled the interview in a letter dated June 28, 2U01. *See* IAF, Tab 3, Subtab 4k. In his letter, Richardson stated, *inter alia*, that the appellant could contact James Schillinger, Chief, Human Resources Management Service, if he had any questions. The appellant wrote a memorandum to Schillinger on July 2, 2001 asking to reschedule, reporting that he was on annual leave until July 11, 2001 and Lipman was out of his office until July 15, 200l.[19] *See* IAF, Tab 3, Subtab 41. In a letter dated July 2, 2001 that he signed for Sims, Schillinger rescheduled the interview for July 11, 2001. *See* IAF, Tab 3, Subtab 4m.

Schillinger testified he was the "go-between" who arranged the July 11, 2001 date after talking to Bond or his (Bond's) supervisor. HT at 106-07. According to Schilhinger, he learned that Bond would not be available for "at least another two weeks (beyond July 11, 2001), and then that wasn't definite either." HT at 108; *see also* HT at 115 (Bond available in late July). However, Schillinger further testifed

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[19] Lipman was sailing off the coast of Maine during the first two weeks of July 2001.

that he recalled telling them, i.e., Bond and/or his supervisor, "when Dr. Sher would be back from vacation (July 11, 2001) and when would be an appropriate time for Mr. Bond to be able to come." HT at 117. Admitting that he was contacted by Keith R. Varner, a partner in the Lipman & Kitz law firm, attempting to change the date to some other in July, Schillinger testified that he "did not attempt to rearrange that date (July 11, 2001) based on what I was told by Mr. Bond's office." HT at 118. Schillinger did not know about Bond's being in Maine on July 13, 2001, *see infra*, until after the July 11, 2001 interview (which he did not attend). HT at 118-19.

Bond is only sure that the appellant could not make the initially scheduled July 10, 2001 interview. He is not sure that Schillinger indicated to him (Bond) that there was a problem with the appellant's attorney being there on July 10, 2001. HT at 96. It anpears from Bond's testimony that Schillinger only asked him (or his supervisor; if he (Bond) could change his schedule to be at the Togus Center on July 11, 2001—which he could. Bond was otherwise aware that on July 11, 2001, while at the interview, Varner, who was present with the appellant, wis seeking to reschedule to another date, but he does not recall whether he (Bond) could have rescheduled it to July 13, 2001. HT at 98-99. Bond could not otherwise affirm or deny his availability for any other date in July 2001.

Carol Moore, the attorney representing the agency at the July 11, 2001 interview, testified she was not aware of a scheduling problem until she arrived at the interview. She remembers some discussion about rescheduling to July 13, 2001 but, in

her view, it was a non-issue because "the problem with the U.S. Attorney's Office would still be there." HT at 186-87.

The appellant testified that he specifically asked Schillinger to reschedule for July 13, 2001 because Lipman could make it on that date.[20] HT at 323. Schillinger said he would consider it but then came forth with his July 2, 2001 letter setting the interview for July 11, 2001. *Id.* It is noted that both agency letters of June 28, 2001 and July 2, 2001 contained the sentence: "You are entitled to a representative of your choice."[21]

As mentioned before, Varner accompanied the appellant to the July 11, 2001 interview. He testified that he has not practiced criminal law in Maine since being first licensed there in 1988.[22] HT at 28, 35. Before the interview, Varner telephoned Schillinger

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[20] This despite the fact the appellant s July 2, 2001 letter to Schillinger, *see* IAF, Tab 3, Subtab 41, as already mentioned, stated Lipman was on vacation until July 15, 2001. Evidently, the appellant found out on July 2, 2001 that Lipman would have been able to cut his vacation short to attend a July 13, 2001 interview and he conveyed that fact orally to Schillinger before Schillinger authored his own July 2, 2001 letter. *See* HT at 323.

[21] There is no law or government-wide civil service regulation providing that one may be represented by a "representative of [his] choice" in a situation such as the one the appellant found himself in. Moreover, neither party could point to an agency regulation to this effect. However, I find that such words are not without meaning in this case. *See* text *infra*.

[22] And he practiced only a little criminal law before that while in private practice in Wisconsin. HT at 35.

on July 6 or 9, 2001 to discuss rescheduling. According to Varner, Schillinger indicated there would be no further rescheduling, that the matter had dragged on long enough, that the agency wanted "to get this over," and that Bond would not be available in the area again until at least the end of July.[23] HT at 31-32. At the interview, Varner attempted to reschedule to July 13, 2001 after allegedly learning from Bond that Bond would be in Portland on that date and could have rescheduled to then. [24] HT at 3 2-33.

Varner testified that he did not feel comfortable giving advice to the appellant as to the U.S. Attorney's declination of prosecution and made it clear to the agency at the interview that he would be discussing matters with and getting approvals from Lipniiin (by cellphone). In essence, Varner was sitting in as a second-stringer in Lipman's absence. Varner's testimony is bolstered by his contemporaneous July

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[23] I note that Schillinger did not contradict any of this in his testimony.

[24] This conclusion was highly speculative on Varner's part. Even if Bond was scheduled to be in Portlard on July 13, 2001, a fact never conclusively shown, this does not mean he could have made himself available at the Togus Center, another hour's drive beyond Portland, any time that day. He could very well have been fully occupied in Portland for the whole day. In sum, the purported fact that Bond was somewhere else in Maine on July 13, 2001 is just not of any great moment without knowing a lot more, none of which the appellant even attempted to show.

13, 2001 letter, written on July 12, 2001, about the events of July 11, 2001. *See* IAF, Tab 3, Subtab 4o.

Moore, who clearly was the agency official ultimately responsible on July 11, 2001 for rescheduling the interview, or not, refused to reschedule and the interview (more accurately, the non-interview) happened (more accurately, didn't happen). HT at 34.

The July 11, 2001 letter from the U.S. Attorney's Office states, in pertinent part, as follows:

> The conduct for which Mr. Sher was being considered for prosecution was his request and receipt of drug samples (specifically Lipitor) in August of 2000 and in January and February of 2001.

From a review of Bond's investigative reports and the notice of proposed adverse action, this letter was inaccurate in several respects. First, the appellant made requests for Lipitor in June, August, and December 2000 (twice) and in January 2001, not in January 2001 and not in February 2001. He only received Lipitor in January 2001, not in August 2000 and not in February 2001. In fact, February 2001 is a completely bogus date. There were no requests/receipts in February 2001. Nothing happened in February except the appellant's first interview with Bond.

With respect to the addition of potential crime "dates" in the U.S. Attorney's letter, I agree with

Moore who told Varner at the July 11, 2001 interview that this wot.ld give the appellant more protection, not less protection.[25] HT at 183. Having said this, I note the ambiguity the inclusion of the February 2001 date presented. The appellant could only wonder what the U.S. Attorney's Office had in mind or had been told which caused it to include this date.[26] Moreover, with respect to missing crime "dates," i.e., the June 2000 solicitation and the two December 2000 solicitations, their absence could only cause more ambiguity. Also, Lipman could certainly have raised probing questions had he been there to read the U.S. Attorney's letter firsthand when the appellant was being asked to provide information to Bond.

There was much testimony from Moore, Bond, and Varner relative to the U.S. Attorney's letter of July 11, 2001. Although there are slight differences in the three accounts, essentially what happened is not in dispute. Moore asked Varner before she

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[25] Varner did not recall raising any issue at the July 11, 2001 interview relative to the dates cited by the U.S. Attorney in his letter. It was Moore who remembered, testifying that Varner raised a question about them. HT at 183, 188-89.

[26] Or to include the August 2000 date which Bond did not report until he filed his April 18, 2001 supplemental report, a report which was never forwarded to the U.S. Attorney. So what we have is the U.S. Attorney's Office including dates in its July II, 2001 letter declining to prosecute which it had no knowledge of on March 7, 2001 (the date it told Bond it was declining prosecution), and not including dates of possible crimes which it did have knowledge of on March 7, 2001.

telephoned the U.S. Attorney's Office if he wanted any specific language in the letter. Varner did not dictate specific language but he did say that the letter should contem words to the effect that the office was declining to prosecute the appellant. The record is unclear whether the appellant had been notified in March 2001 or in June 2001 when he met with Bond of the U.S. Attorney's declination to prosecute.[27] Certainly, the first written notification of the declination to prosecute was Richardson's statement in his June 28, 2001 letter, a statement which Schillinger, signing for Sims, repeated in his July 2, 2001 letter. *See* IAF, Tab 3, Subtabs 4k and 4m. The U.S. Attorney's letter did come back with the words as Varner had suggested but, after Varner later spoke to Lipman by cellphone, the concerns expressed by Lipman to the effect that the language did not go far enough became the major obstacle preventing the appellant from answering Bond's questions. Lipman, an experienced criminal attorney, obviously was focusing on an important distinction, in his view, between a declination to prosecute and a grant of immunity.[28]

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[27] Bond testified that he so notified the appellant in March or June 2001 when he interviewed or attempted to interview the appellant. HT at 81-82. However, his memory was so poor on every aspect of the purported interview that no credence can be attached to this testimony.

[28] The appellant requested I take notice that immunity is a far broader concept of protection than a declination to prosecute. HT at 360. Lipman's perceived distinction was enunciated by Varner in his testimony when, after talking with Lipman on

In view of all of the above, I find the following. While the agency's frustration in not being able to procure the appellant's cooperation on July 11, 2001 is understandable, that frustration, I find, was of its own creation. Communications were impeded between the representative of the appellant's choice, Lipman, and the agency representative, Moore, and, as a result, what I find were legitimate concerns surfaced, dominating the appellant's view of the situation and causing him to refuse to answer Bond's questions. But, I find, the root, or proximate, cause of the impeded communications and the resultant refusal to cooperate in the investigation at that time was the agency's failure to accede to the appellant's request to reschedule the July 11, 2001 interview either 2 days, until July 13, 2001, or at most 2 weeks, until Late July, so that Lipman's and Bond's schedules could be coordinated.[29]

July 11, 2001, he apparently told Moore that what was wanted was an absolute statement that the appellant would not be prosecuted and that anything he said that day would not be used against him. HT at 50-51. I later find, *see* text *infra*, that it is unnecessary to determine if there is a distinction.

[29] Certainly, communications could have been greatly enhanced on July 11, 2001 if the situation had been handlod differently. For instance, if someone had thought to have Varner talk to Lipman *before* he responded to Moore on what words the letter from the U.S. Attorney's Office thould contain, the acceptability of the language would likely have been eliminated as a concern. Better yet, if Moore had talked directly with Lipman on July 11, 2001, instead of through the second-stringer Varner, Lipman's

I find it more likely than not that had Lipman been present at a July 13, 2001 or late July interview, the parties would have worked out a resolution of the appellant's concerns relative to the status of any possible criminal prosecution by the U.S. Attorney and that the appellant would have not refused to answer Bond's questions.[30]

As in *Modrowski:*, I find here that the agency did not explain why the appellant's request to reschedule, which I find to be entirely reasonable,[31] could not have been accomodated. If Schillinger's belief that "this matter had dragged on long enough" and that it was time "to get this over with" is taken as the agency's explanation, I find it to be disingenuous, especially given the fact that the agency itself had already delayed the taking of

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concerns would have had a much better chance of being successfully addressed. But none of this happened and Lipman's absence at the interview was the major cause of the appellant's refusal to answer Bond's questions.

[30] I disagree with Moore's assessment that rescheduling was a "non-issue." If Lipman had been present at the interview, I find it likely he could have, and would have, satisfied himself, albeit after some fair amount of give-and-take discussion probably including the U.S. Attorney's Office, that his client's right not to incriminate himself was assured.

[31] I agree with the appellant when, in his closing argument, he stated that common sense instructs that the first 2 weeks in July are prime vacation weeks when "not a lot gets done." HT at 360-61.

administrative action approximately 4 months, i.e., from the March 7, 2001 notification of declination of prosecution to July 11, 2001. Moreover, it is evident that when Schillinger spoke to Bond or Bond's supervisor on July 2, 2001, he made no attempt to accommodate the schedule of Lipman, the appellant's representative of choice, for either a few days, until July 13, 2001, or a few weeks, until late July 2001. It is clear from his own testimony that he only concentrated on when the appellant was available, July 11, 2001, and paid no heed whatsoever to when Lipman was available, nullifying the whole concept of "representative of your choice." In short, Schillinger failed to give Bond's office the option of scheduling the interview for any date other than July 11, 2001.

A second point on which this case is similar to *Modrowski* involves the ambiguous scope of the declination to prosecute. The U.S. Attorney's July 11, 2001 letter says she[32] declined to prosecute on March 7, 2001. It does not say that the declination was still in effect on July 11, 2001. Moreover, as already mentioned, the dates of the alleged requests/receipts of Lipitor do not comport with the actual dates of these activities; the U.S. Attorney's Office exhibited total confusion on these dates in its letter.

I make these findings with the realization that in *Modrowski* the charges the U.S. Attorney may not have known about were "related," not the same as the

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[32] I.e., Paula D. Silsby, U.S. Attorney for the District of Maine.

ones she/he did know about, whereas here the only matter the U.S. Attorney appeared not to appreciate was the number of the same type of charge(s) and when the individual offenses occurred. Also, I realize that the U.S. Attorney was probably indicating that she did not believe this case presented a serious enough crime to prosecute no matter the number of offenses the appellant committed.[33] However, what the U.S. Attorney may think or do in any given case is a matter of conjecture and a person in the appellant's situation would be unwise to presume what she is thinking or may do. The possible consequences, a fine and/or jail, are too serious to leave anything to conjecture. A criminal attorney would be foolish indeed to allow his client to answer questions in an administrative interview and put the client in harm's way if there were the degree of doubt, as here, that a grant of immunity/declination to prosecute had been or had not been made.[34]

None of the above touches on the more basic issue of whether a "grant of immunity" is legally

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[33] This is a mitigating factor considered in the penalty analysis. *See* text *infra*.

[34] Moore's and Bond's testimonies to the effect that the U.S. Attorney's Office could never go forward after having given the declination she gave here, HT at 74, 82-83, 190, is all so much conjecture on their parts. As Moore readily admitted, she does not really know what the U.S. Attorney's Office would do. HT at 193. And, as Bond testified, he would go back to the U.S. Attorney's Office if he uncovered more criminal violations in the course of his investigation. HT at 73-74. What effect that might have on a previous declination is anyone's guess.

distinct from a "declination to prosecute." While in the day-to-day practice of criminal law there may well be a fine distinction embedded in the thinking of practitioners,[35] I note that the *Modrowski* court, as well as the *Weston* court, discussed them as if they were the same, or at least coextensive. In other words, these courts indicated that a grant of immunity was made when the U.S. Attorney said she was declining to prosecute. Under the circumstances, I find it unnecessary to determine if there is a distinction while recognizing that Lipman, credibly, had a real concern about one.

There is a factor present in this case that was not present in *Modrowski*. The appellant exhibited a willingness, immediately after July 11, 2001, to cooperate in the agency's investigation. Varner's July 13, 2001 letter expresses a willingness on the appellant's part, once "adequate assurances" are received precluding the U.S. Attorney from filing criminal charges against the appellant at a later date, to "produce Dr. Sher at a mutually convenient time to complete the interview." *See* IAF, Tab 3, Subtab 4o. Lipman later wrote a letter to Moore on July 25, 2001, after she had referred him to some pertinent

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[35] I note that *Black's Law Dictionary* carries no entry for "declination to prosecute" but does for "use immunity:' which is what a grant of immunity would be in the situation here. That definition is "[i]mmunity from the use of the compelled testimony in a future prosecution against the witness. After granting use immunity, the government can still prosecute if it shows that its evidence comes from a legitimate, independent source." *Black's Law Dictionary*, (7th ed. 1999) at 754.

case law, e.g., the *Weston* and *Hanna*[36] cases which stated, *inter alia,* "if you wish to have an interview and it is scheduled at a mutually convenient time, we will be there and we will cooperate. However, I would want the same language offered from the VA as was provided in both the Weston and Hanna cases." *See* IAF, Tab 3, Subtab 4p. From a review of these letters, I find that the appellant's refusal to answer questions was not absolute by any means but was always made contingent on being provided with what Lipman considered, in his best legal judgment, "adequate assurances" his client was not walking into a legal minefield wherein he would incriminate himself.

In sum, I find that the appellant should not have been required under the circumstances of his case to provide information to Bond on July 11, 2001. Consequently, his refusal to provide information did not violate 38 C.F.R. § 0.735.12.[37] Charge 1i is thus not sustained.

Summary—Four charges have been sustained, one not sustained.

To summarize my findings on the charges: I have sustained four of the five charges sustained by

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[36] *Hanna v. Department of Labor,* 80 M.S.P.R. 294 (1998), 18 Fed. Appx. 787 (2001).

[37] Said differently, it was arbitrary and capricious for the agency to charge the appellant with a refusal to cooperate in an investigation. *See* footnote 13 *supra.*

Sims in his October 22, 2001 decision, three involving solicitation of gifts[38] and one receipt of gifts.

The appellant's affirmative defenses of national origin and religious discrimination have not been proved.

The appellant alleged discrimination in the demotion/suspension action on the basis of his religion, Muslim, and national origin, Pakistani.

With respect to the allegation of religious discrimination, it is axiomatic that there can be no discrimination against a member of a group if the alleged discriminating official was not even aware of the appellant's group membership at the time he effected the underlying personnel action. *Winfrey v. US. Postal Service,* EEOC No. 01880313 (Mar. 28, 1988).

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[38] Even though an argument could be made that the three solicitation charges, 1a, 1b, and 1c, should have been framed, and sustained, as one charge because all involve the solicitation of gifts in violation of the same regulation, I find that the agency could properly frame them as three separate charges. *Compare Washington v. Department of Veterans Affairs,* 49 M.S.P.R. 632, 638-39 (1991) (agency could not reasonably anticipate two separate incidents of insubordination occurring over a 2-week period and thus could properly frame two charges of insubordination) *with. Southers v. Veterans Administration,* 813 F.2d 1223. 1225 (Fed. Cir. 1987) (agency abused its discretion by bringing 19 separate charges of false testimony instead of one where employee was asked—and responded falsely to—essentially the same question 19 times on one date). Moreover, whether considered as one or three charges, there is no practical consequence relative to my findings on the penalty issue. *See* text *infra.*

In an adverse action appeal, the discriminating official would normally be the one who decided the adverse action, here Sims.[39] Sims testified that he only became aware of the appellant's religion *after* effecting the adverse action, when the appellant raised the allegation of religious discrimination. HT at 124. There was no evidence offered to contradict this testimony and I otherwise find it credible that Sims would not likely be aware of the appellant's religion unless he was specifically informed of it.[40]

In view of all.of the above, I find the appellant's allegation of religious discrimination to be without merit.

With respect to the allegation of national origin discrimination, the appellant attempted to prove it by showing he had been disparately treated, i.e., many others had requested and received drug samples from pharmaceutical company representatives.

An appellant who claims discrimination based on disparate treatment must establish that: (1) he is a member of a protected group; (2) he was similarly

[39] Some focus may be accorded the proposing official, here Richardson, but only if he appears to have had some influence on the deciding official. *See Arredondo* v. *US. Postal Service, 85* M.S.P.R. 113, 121 (2000). Sims testified that he discussed the matter of the appellant's discipline with Richardson, HT at 146, but I find Sims was not influenced by Richardson in deciding what discipline to take against the appellant in any meaningful degree. Thus, the focus will be solely on Sims.

[40] I note that just because Sims knew the appellant was Pakistani does not mean he knew the appellant was Muslim. People of Pakistani national origin practice various religions.

situated to an individual(s) who was not a member of his protected group; and (3) he was treated more harshly or disparately than the individual who was not a member of his. protected group. *Snell v. U.S. Postal Service,* 82 M.S.P.R. 674, 677 (1999). Where, as here, the record is fully developed, the inquiry shifts from whether the appellant made a prima facie case of discrimination to whether he met his ultimate burdr'n of proving his affirmative defense. *Id.* citing *Jackson v. US. Postal Service,* 79 M.S.P.R. 46, 53(1998).

Although there was much evidence offered to show that Sims should have known others were requesting/receiving drug samples, *see* penalty analysis *infra,* the record is clear that he did not know the identity of any employee, except the appellant, who was guilty of such infraction, indeed, the appellant and others questioned by Bond about the matter refused to divulge the identity of any other perpetrator. Thus, although the appellant has shown that he was the member of a protected group, Pakistani,[41] I find he has not shown that he was similarly situated to an individual who was not a member of his group or that he was treated more harshly than any such employee.[42] Thus, I find that

[41] Sims admitted he knew the appellant's national origin to be Pakistani. HT at 123.

[42] The appellant attempted to show at hearing that Sims did not like him and treated him badly on day-to-day workplace issues. My review of this evidence discloses no direct evidence of discrimination, i.e., no written or verbal policy or statement made by Sims reflecting directly the alleged discriminatory

he has not proved his affirmative defense of national origin discrimination based on disparate treatment.[43]

There is a nexus between the four sustained charges and the efficiency of the service.

I find that there is a clear nexus between the four sustained charges and the efficiency of the service standard. An obvious connection between violations of the standards of ethical conduct for Federal employees and service efficiency exists and would normally call for the imposition of some' disciplinary action. However, as I find below the unusual circumstances present in this case dictate that no disciplinary action is warranted here.

The penalty of reduction in grade and pay and 45-day suspension exceeds the limits of reasonableness.

Where, as here, the agency proves fewer than all of its charges, the Board may not independently

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attitude and bearing directly on the contested employment decision. *See George v. US.' Postal Service,* 74 M.S.P.R. 71, 80 (1997). Otherwise, the alleged discriminatory matters presented do not relate to the appellant's demotion/suspension so that, even if the product of national origin discrimination, they do not establish that national origin discrimination was a motivating factor in the demotion/suspension. *See Rockwell v. Department of Commerce,* 39 M.S.P.R. 217, 224 (1988).

[43] I note my firm impression from reviewing the totality of the evidence that Sims would have taken the same action against anyone who found himself in the same hapless circumstances as the appellant.

determine a reasonable penalty. *Lachance v. Devall,* 178 F.3d 1246, 1260 (Fed. Cir. 1999). Rather, unless the agency has indicated that it desires a lesser penalty to be imposed on fewer charges, the Board may mitigate to the maximum reasonable penalty if a careful balancing of the mitigating factors warrants, or the Board may impose the same penalty imposed by the agency based ou a justification of that penalty as the maximum reasonable penalty after balancihg those factors. *Id.* The Board has characterized its obligations as "not necessarily one which the Board's view would be the 'best' or the 'most reasonable' penalty, but rather the maximum penalty that the Board would find to be 'within the parameters of reasonableness." *See Davis v. Department of the Treacury,* 8 M.S.P.R. 317, 320-21 (1981).

In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. The Board recognizes that its function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management judgment has been properly exercised and that the' penalty selected by the agency does not exceed the maximum limits of reasonableness. Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. *Stuhlmacher v. U.S. Postal Service,* 89 M.S.P.R. 272, 279-80 (2001); *Fowler,* 77 M.S.P.R. 8, 12 (1997); *Douglas, 5* M.S.P.R. at 306. However, if the deciding official failed to appropriately consider

the relevant factors, the Board need not defer to the agency's penalty determination. *Stuhimacher,* 89 M.S.P.R. at 280; *Omites v. US. Postal Service,* 87 M.S.P.R. 223, 228-29 (2000).

Sims testified extensively about his consideration of the *Douglas* factors.[44] For ease of reference, each of the *Douglas* factors is enumerated before Sims's testimony about it.

> *Douglas* factor (1) - The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent or was committed maliciously or for gain, or was frequently repeated.

Sims testified that as Chief of the Pharmacy Service, the appellant was held to a higher standard than others; that the appellant needed to set an example (implying he didn't in this case); that the

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[44] The record evidence contains a "Douglas Factors Checklist" dated August 21, 2001 (the same date as the notice of proposed removal) and authored by the proposing official, Chief of Staff Richardson. Richardson wrote a narrative on each of the 12 enumerated *Douglas* factors. *See* RAF, Tab 5, Appellant's Exhibit E. If this document had been authored by Sims, it would be relevant and useful since the focus in an adverse action case is almost always exclusively on the deciding official's consideration of the *Douglas* factors, not the proposing official's. Otherwise, Sims was quite unsure whether he ever saw Richardson's checklist or whether he had ever authored a similar checklist himself. HT at 160-61.

appellant had to be aware of the rules and regulations by which government employees are bound '(implying he wasn't in this case); and that the appellant was responsible for station, i.e., facility or Togus Center, policy relative to drug samples (implying he didn't live up to that responsibility). HT at 126. He added that "the infraction was serious enough that it called into question the integrity of the individual." HTat 141.

> *Douglas* factor (2) - The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.

Sims testified again that as Chief of the Pharmacy Service, the appellant was expected to know what the rules, regulations, and policies were and ought to have been the one setting an example as to them. HT at 136.

> *Douglas* factor (3) - The employee's past disciplinary record.

Sims testified that the appellant had no past disciplinary record. HT at 136.

> *Douglas* factor (4) - The employee's past work record, including length of service,, performance on the job, ability to get along with fellow workers, and dependability.

Sims testified emphatically that the appellant was a "very good employee." HT at 136.

> *Douglas* factor (5) - The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties

Sims testified that the appellant was in a position of trust and there was an expectation that he set a good example for others (again implying that the appellant failed in this). HT at 136-37.

> *Douglas* factor (6) - Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

Sims testified that there were no similar instances of the request/receipt of drug samples at the Togus Center. HT at 137.

> *Douglas* factor (7) - Consistency of the penalty with any applicable agency table of penalties.

Sims testified that he used the agency's penalty guide to lessen the proposed removal to a demotion/suspension. HT at 137; *see* IAF, Tab 3, Subtab 4a ("Range of Penalties for Stated Offenses").

> *Douglas* factor" (8) - The notoriety of the offense or its impact upon the reputation of the agency.

Sims testified that this case "was a high profile item, because of the ethics of the issue." He also related consideration of this factor to training and "something that needed to be addressed." HT at 138.

> *Douglas* factor (9) - The clarity with which the employee was on notice of any rules that were violated in committing the offense, or has been warned about the conduct in question.

Sims testified that the appellant was well aware that he should not have done what he did because he was the Chief of the Pharmacy Service and there existed "the station circular about the issue" and government-wide ethics training. HT at 139.

> *Douglas* factor (10) - Potential for the employee's rehabilitation.

Sims testified "that this one was difficult" but the seriousness of the situation made it imperative to take some decisive action. By "seriousness" he meant the "amount ofthe medication that was involved here." HT at 139. It was more than a sample that was solicited, according to Sims. HT at 167. Sims added on cross-examination, after some prodding by the appellant's counsel, that the fact the appellant admitted in his written reply to the proposed removal that he did something wrong was significant and the fact he said in that reply that he would not do it again was one of the mitigating factors in reducing the penalty. HT at 155-57.

> *Douglas* factor (11) - Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impariment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

Sims testified that there were no mitigating circumstances surrounding the offense. HT at 139.

> *Douglas* factor (12) - The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Sims testified that this was a serious infraction" and "needed to be dealt with appropriately in that regard." HTat 140.

Several of the *Douglas* factors merit little discussion. As Sims noted, the appellant had no prior disciplinary record, so *Douglas* factor (3) is mitigating as an indicator of a potential for rehabilitation. *See infra.*

With respect to *Douglas* factor (4), as Sims noted, the appellant was "a very good employee." The record evidence otherwise shows that the appellant has worked for the agency for 18 years and been Chief of the Pharmacy Service (in two facilities) for the last 6 years; he has instituted significant cost savings measures as the chief he has received high evaluations; and he is well-liked and well-respected by his colleagues. *Douglas* factor (4) is thus also mitigating as another indicator of a potential for rehabilitation, *see infra,* even though, as Sims also noted, this is not a performance case. HT at 136.

I find that *Douglas* factor (6) raises a significant (and interesting) issue, but an issue which need not be resolved here because of my findings below on more pertinent *Douglas* factors. The issue is one of selective prosecution, a closely related one to that of consistent or disparate, penalties. As one

commentator on Board practice has stated: "The Board has not yet accepted the~ defense of selective prosecution." P. Broida, *A Guide to Merit Systems Protection Board Law and Practice* 1647 (2002). Indeed, there is no conclusive precedent on the issue presented here: What should the effect be of an agency's seeming unwillingness to learn the identities of employees committing the same or similar offenses the appellant was committed when those offenses are commonly known, e.g., open and notorious, in the workplace?

Because the evidence is clear that the agency here did not know the identities of any perpetrators of the same or similar offenses, choosing to forgo reasonable, albeit unpleasant, measures to learn them, I find that there are no comparatives on which to base any finding that there was selective prosecution or inconsistent penalties. *Cf Golden v. U.S. Postal Service,* 60 M.S.P.R. 268, 273-74 (1994) (hearing testimony did not establish that agency officials were aware of other employees engaging in personal activities while on duty). Thus, I will not further consider *Douglas* factor (6).

Douglas factor (7) is of no consequence in this case. The penalty guide used by Sims calls for a range of penalties from reprimand to removal for both types of charges (i.e., offenses) Sims was considering in this case.[45] Thus, even if Sims had not had the

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[45] Refusal to cooperate in an investigation is #25 in the penalty guide and accepting gifts is #33. *See* IAF, Tab 3, Subtab 4a.

refusal-to-cooperate charge in front of him, he would still have been looking at an acceptable range of penalty from reprimand to removal, a range within which he selected a (mitigated) penalty.

I find with respect to *Douglas* factor (11) that Sims is correct in that there were no circumstances such as unusual job tensions, harassment, etc., which led to the alleged misconduct at issue here. The appellant certainly did not request/receive drug samples because he was under duress or not of sound mind. Thus, this factor is not one for consideration in the appellant's case.

All other *Douglas* factors, i.e., (1), (2), *(5),* (8), (9), (10), and (12), will be analyzed below.

To summarize Sims's justification for effecting the demotion/suspension penalty on the appellant based on the *Douglas* factors, it is that as the Chief of the Pharmacy Service, the appellant was held to a higher standard of conduct. Also, he was ultimately responsible for establishing the facility's policy on such matters as requesting/receiving drug samples from pharmaceutical company representatives. Thus, he had to, more than anyone else, be aware of the rules, regulations, and policies regarding such matters and be setting an example of adherence to those rules, regulations, and policies. Sims also implied that because of the appellant's offenses, he questioned his integrity and lost trust in him as a supervisor. Sims also noted the "high profile," i.e., notoriety, within the facility that the appellant's offenses had created, the failure to abide by the teachings of the ethics training which the appellant had taken along with everyone else, and the

seriousness of the offenses as reflected in the large amount of medication requested/received. The only mitigating factors Sims mentioned, at the prodding of the appellant's counsel, were that the appellant admitted wrongdoing and he promised not to request/receive drug samples again.

There can be no doubt that as a supervisor and the chief of an agency medical service in a facility devoted to caring for the nation's veterans, the appellant must be held to a higher standard of conduct than most employees. *See Cristia v. Department of Justice,* 36 M.S.P.R. 75, 79 (1988), *aff'd,* 861 F.2d 778 (Fed.. Cir. 1988) (Table) '(supervisors held to higher standard of conduct). But then the issue becomes whether the standard of conduct to which he was held accountable is a reasonable one under the appellant's particular circumstances. In this instance, I find it is not.

The appellant argued that he was not responsible for establishing the policy about requesting/receiving drug samples; that although he is aware of the rules, regulations and policies regarding same, those have always been interpreted by him and all other providers in the Togus Center and other agency facilities that it is permissible to request/receive drug samples; that no ethics training has ever contradicted that interpretation; and that he did not request the large amount of Lipitor he eventually received—he did not know how much he would get as a result of his requests.'

[1] Review of a "Pharmaceutical Exhibits and Detail Procedures" Circular ("Circular"), dated August 6, 1999, shows that it addresses the activities

of pharmaceutical company representatives with the Togus Center, not the behavior of agency employees. However, the agency highlighted one section of the Circular which, according to Sims, is supposed to also provide its employees with clear notice that drug" ~amples cannot be requested/received from pharmaceutical company representati(res for veteran patients or for their own use. That is section 4g which reads: "Due to Federal regulations regarding drug diversion, SAMPLING IS NOT PERMITTED within the Medical Center." However, Sims's interpretation of this section was contradicted by the appellant, Mark Connelly, Chief of the Pharmacy Service, Manchester (New Hampshire) Medical and Regional Office Center ("Manchester Center") and the Chairman of the New England Chiefs of Pharmacy Advisory Council, and Ann M. Vassey, presently acting Chief of the Pharmacy Service, Togus Center.

The appellant testified that he did not draft the Circular—thus, the wording in section 4g is not his. In 1999 when the Togus Center was about to undergo a hospital accreditation process, he put the August 6, 1999 date on an existing circular and reissued it.[46] HT at 294.

As to what the words mean, the appellant did not testify directly about that but did imply in his testimony that they meant drug samples were not to be used for veteran patients. The words did not

[46] It is otherwise obvious that the appellant was the responsible authorizing official for reissuing such circulars because it pertained to pharmaceutical procedures.

address drug samples for providers, which were otherwise aliowed. HT at 293. Vassey, who worked for the appellant until he was demoted arid 'then took over as the Acting Chief, testified that section 4g means no drug samples were to be left by the pharmaceutical company representatives in thi hospita1 for patient use. HT at 255. Connelly testified that the Manchester Center has a similar policy as the one promulgated in the Circular. The words in section 4g mean to him that drug samples cannot be dispensed directly to a veteran patient. HT at 220.

In view of all of the above, even if the Circular, which by its nature is directed only at pharmaceutical company representatives, could be found to be notice also to agency employees, I find that its interpretation is correctly made by the three pharmacists, who testified, not by Sims who, as indicated below, has no clear knowledge of pl'armaceutical procedures. And that interpretation is that drug samples cannot be provided to veteran patients, and that's all. The Circular just doesn't address the request/receipt of drug samples by providers.

The appellant testified that "throughout the VA system you cannot accept samples for patient care, for personal and family use you can." HT at 292. He certainly never received notice from anyone that the practice of health care providers, such as himself, requesting/receiving drug samples was forbidden. HT at 293, 300. According to the appellant, no one at the Togus Center was hiding the use of samples; it was open and notorious. HT at 302. Vassey testified that if a physician or a provider

wished to have drug samples, those samples were left in the pharmacy by the pharmaceutical company representatives for distribution to the physician/provider. HT at 250; *see also* RAF, Tab *5*, Appellant's Exhibit I (Vassey's September 6, 2001 Statement). Connelly testified that "professional sampling is fairly widespread in the VA among physicians" and that there was "no law, rule or regulation specifically regarding samples" of which he was aware. HT at 212, 214; *see also* RAF, Tab 5, Appellant's Exhibit N (Connelly's September 6, 2001' Statement). Connelly opined that a medical center director like Sims, who is not a physician, would not realize that drug sampling to providers is probably happening in his facility. HT at 222.

Many Togus Center witnesses, long-term employees, testified on the same point. All understand the agency policy, strictly adhered to, that veteran patients do not get drug samples. They all also believe that the policy provides for professionals requesting/receiving drug samples. Paul A. Grayce, M.D., Chief of the Mental Health Service, testified that drug samples can be obtained from pharmaceutical company representatives and that he has gotten them that way. HT at 200. "People thought nothing of it happening." "It was a common practice." "No one made any effort to hide it." HT at 20 1-02; *see also* RAF, Tab 5, Appellant's Exhibit *Q* (Grayce's September 5, 2001 statement). Grayce never thought of drug samples as "gifts." HT at 204.

Neal K. Anderson;. M.D., Staff Physician, testified that it is an open and notorious practice to receive

drug samples from pharmaceutical company representatives and that' he and three to four others he knows have received them that way. HT at 225-26. He also testified that he does not consider drug samples to be gifts; it's such "common practice (to receive drug samples), it's not thought of." It is "considered to be just colleagues (i.e., health care providers and pharmaceutical company representatives) helping each other out." "It doesn't have the feeling that you're taking something for some reason." HTat 230.

George L. Boccia, M.D., Chief of Pulmonary, testified that when he arrived at the Togus Center 10 years ago the Chief of Medicine told him that "you can't take samples to give to patients, but it was okay to take them for your own personal use." HT at 246. He has seen pharmaceutical company representatives leave drug samples'at the hospital. HT at 247. In a September *5,* 2001 statement, Boccia stated that it "is common knowledge that many physicians and pharmacy chiefs have done exactly the same (accept drug samples) over the years." *See* RAF, Tab *5,* Appellant's Exhibit M.

Philip B. Amidon, M.D., Chief of Gastroenterology until he resigned on April 29, 2002, testified that it was "very, very common for drug companies to provide drug samples." HT at 267. "It's a courtesy thing:" HT at 268. The pharmaceutical company representatives told him when he first came to the Togus Center in 1990 that they could not leave samples for his patients but could leave them for him and his family. HT at 268. According to Amidon,

physicians and pharmacists, including former Chiefs of the Pharmacy Service, have taken drug samples for personal and family use for years. HT at 269-70; *see also* RAF, Tab 5, Appellant's Exhibit U (Amidon's undated statement). He has spoken to six to twelve physicians who have told him they were taking samples. HT at 280. He was never made aware this was against agency policy. HT at 268. Amidon also does not consider drug samples to be "gifts." HT at 281. Amidon implied that because Sims is "extremely aloof," i.e., he has no contact with physicians, he would have no knowledge of the sampling practice going on in the hospital. HT at 283.

Ron A. Fattor, M.D., Chief of Pathology and Laboratory Medicine, stated in his September 6, 2001 statement that he was "aware that many physicians (in internal medicine, etc.) occasionally use such [drug] samples for their own use. This sort of activity is (to the best of my knowledge) 'routine.'" *See* RAF, Tab 5, Appellant's Exhibit P.

In view of all of the above, I find that the request/receipt of drug samples from pharmaceutical company representatives is part of the ingrained culture of doing business at a VA medical facility, as it is in the medical community generally, and has been for many years. The appellant is just one of many providers, including former Chiefs of the Pharmacy Service who worked under Sims, engaging in the practice through the years. He cannot be faulted for honestly believing there was absolutely nothing wrong with the practice. Certainly, the weight of the evidence is that no one had ever indicated to the appellant in his 18 years with the

agency that the practice was in any sense improper, illegal, or unethical.[47]

I find the practice is not analogous to speeding, as the agency representative alleged in arguing the appellant's guilt. In speeding, everyone realizes he is doing something wrong and hopes not to be the one to get caught. With the sampling that went on here, no one realized he/she was doing anything the least bit wrong, so when one of them was "caught," he and everyone else expressed emotions ranging from surprise to disbelief to outrage.[48]

I find credence in the assertion/implication of several witnesses, particularly Amidon, that Sims could not properly gauge the seriousness, or, more accurately, the lack of seriousness, about the common practice of requesting/receiving drug samples from pharmaceutical company representatives. Sims is an

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[47] I note that when the appellant was apprehended by the agency's police/security force on January 29, 2001, he readily told them that "there was nothing but samples in his briefcase" and "we do this all the time." *See* JAF, Tab 3, Subtab 4i (Bond's April 18, 2001 Report of investigation and attached Memorandum of Interview of Alam Sher).

[48] The following are come examples of these emotions. "Whole thing sort of a surprise." UT at *256* (Vassey). "Grave disservice." RAF, Tab *5*, Appellant's Exhibit N (Connelly September ~, 2001 statement). "Deeply concerned that [the appellant] may suffer because of behavior that is quite consistent with usual practice." RAF, Tab 5, "Appellant's Exhibit Q (Grayce September 5, 2001 statement). "Charge is biased and hypocritical." RAF, Tab 5, Appellant's Exhibit M (Boccia September 5, 2001 statement). "Truly draconian if [removal] carried out." RAF, Tab 5, Appellant's Exhibit U (Amidon undated statement).

administrator. He did not come out of the medical community into his position so he is at an immediate disadvantage in fully appreciating the culture of that community.[49] It also rings true that Sims was generally "aloof," as described by Amidon, and thus was not familiar with such matters as the requesting/receiving of drug samples in the hospital at the Togus Center.

Several of the physicians and Vassey testified convincingly that the request/receipt of drug samples was considered not gift-like. Vassey never thought about drug samples as being "gifts." HT at 257. Grayce testified that "it doesn't seem like it's a gift." The drug samples, for Grayce, were "useful," as opposed to being of benefit like a present. HT at 204. Anderson testified that to his knowledge "nothing was ever expected in return" for requesting/receiving drug samples. The particular pharmaceutical company representative's products were never promoted. HT at 230-31. Amidon testified that the practice does not prostitute or proselytize his

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[49] I note that Richardson, who proposed the appellant's removal, was a medical doctor and thus was doubtlessly aware of the culture. However, there is no evidence to show how Richardson weighted the several charges in his mind, including some of the charges found not sustained by Sims. Thus, his thinking is not known on the request/receipt charges, i.e., whether he would have proposed removal if just those charges were viable when he issued his notice. Moreover, the appellant testified, credibly I find, that Richardson failed to show much concern when the appellant reported, in April 2000, finding significant drug samples present in the Caribou, Maine clinic. HT at 307-10.

prescribing habits or those of his colleagues; they are not going to favor a particular pharmaceutical company's products just because the representative gave them some samples; the drug samples are considered "samples," not "gifts." HT at 269, 281, 283. Amidon pointed out in his undated statement that the agency has a national formulary that the practice of. requesting/receiving drug samples cannot change. *See* RAP, Tab 5, Appellant's Exhibit U.

From the above,, I find that while the request/receipt of "gifts" is unethical, and the Lipitor at issue here was technically a "gift" under the ethics regulations, I otherwise find that the appellant's technical violation of those regulations is not serious under the particular circumstances of his case. The underlying reason for government employees not to receive gifts, i.e., to enrich themselves to the taxpayers' ultimate detriment, appears to be absent in a situation where the giving of a particular item is viewed as ritualistic and has no effect on the carrying out of the agency's mission.

With respect to Sim's view of the seriousness based on the amount of drug samples the appellant received in this case, I find the following, mostly gleaned from the appellant's testimony, which I found credible in all important respects, and from the Memo'randums of Interview with the two pharmaceutical company :representatives involved in providing the appellant the Lipitor samples at issue. *See* IAF, Tab 3, Subtab 4i. It is clear that the appellant's requests of one pharmaceutical company representative in December 2000 for Lipitor samples had not been satisfied on January 25, 2001 when the appellant requested another pharmaceutical company

representative to get him some samples. As it eventually turned out, both representatives, unknown to each other, brought him samples on the same day, January 29, 2001, It is also clear that the appellant never specified how many samples he wanted from either representative. Thus, I find the appellant had no control over how many Lipitor samples he eventually received. Also, it appears the large quantity the pharmaceutical company ':presentatives provided him, 672 samples, was a byproduct of his need for a 40 mg dosage when all they had in sample packages was 10 mg dosages. Thus, the appellant would need to take 4 tablets per day to adhere to the right dosage. Also, I note that the number of samples the appellant got "caught" with in his briefcase was only part of the total of 672 tablet samples. The remainder, amount undisclosed in the record, was back at his desk, not realized at the time by the appellant, but quickly learned when the police/security personnel returned there with him after first apprehending him. HT at 347-49.

In view of the above, I find that the happenstance of receiving 672 tablet samples of Lipitor on January 29, 2001 cannot be held against the appellant. He could well have been given 60 samples—the quantity was completely out of the appellant's control. Sim's imputation of a "seriousness" factor with respect to the quantity of samples the appellant received is thus misplaced.

With respect to the ethics training which the agency claimed should have made the appellant and others aware that requesting/receiving drug samples was unethical, no one who took this training (and was asked about it at hearing) believed that the training

ever addressed the issue. In other: words, even though ethics training was piovided, witnesses agreed that nothing in the training ever caused them to change',' their opinion that requesting/receiving drug samples was allowed.[50] HT at 256.(Vassey); HT at 204 (Grayce).

In summary, I find that the appellant's offenses were not intentional but were technical, that he never knew that requesting/receiving the Lipitor samples was wrong, and that his offenses were not serious due to the non-gift-like qualities of drug sampies received from pharmaceutical company representatives. In view of these findings, I further find that Sims's questioning of the appellant's integrity should never have surfaced nor should his professed lost of trust in him. The appellant simply was not on prior notice of any policy against requesting/receiving drug samples from pharmaceutical company representatives. Thus, the agency's contention that as a supervisor the appellant was required to set a good example is severely weakened by the fact that the policy appeared to everyone involved to be the opposite of what the agency is now saying it was. *See Talus v. Department of the Navy,* 20 M.S.P.R. 108, 110-11 (1984).

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[50] Except that now, after the appellant's ordeal, the training certainly addresses the subject, HT at 256 (Vassey). One can only wonder why the most obvious situation dealing with "gifts" in a hospital setting would not have been an important part of the training from the beginning.

Moreover, while there was notoriety with respect to the appellant's case, this was created by what those who testified and others believed to be (and I agree with them) Sims's misguided action in punishing the appellant for an activity many others engaged in. The agency certainly never introduced any evidence to show that any provider believed the appellant was being justly punished.

I find that the appellant has great potential for rehabilitation. He has no past disciplinary recotd and excellent long-term prior performance and job dedication. Further, the appellant admitted his conduct was wrong after his attention was brought to bear on it and he promised to never do it again. *See Shelly v. Department of the Treasury, 75* M.S.P.R. 677, 684 (1997) (rehabilitative potential exemplified because appellant testified she would not repeat her misconduct even though she contended in the reply to the proposed removal that her conduct was acceptable).

I thus find that under the particular circumstances of this case that the penalty chosen by Sims was beyond the limits of reasonableness. The situation was just not as serious as Sims made it out to be. Sims was overly focused on the fact that a violation of the ethics regulations had occurred. As a result, he failed to properly consider the underlying facts and other mitigating circumstances present. His selection of a demotion/suspension penalty was grossly disproportionate to th- offense in light of the particular circumstances of the case and was an abuse of discretion. *Cf Taylor v. Department of Justice,* 60 M.S.P.R. 686, 690-92 (1994) (although the Board will normally review an agency's penalty

determination only to ensure that the agency considered the relevant factors and exercised its judgment within the tolerable limits of reasonableness, there may be grounds to mitigate the penalty if the deciding official considered the misconduct to be more serious than it was); *Gunn v. U.S. Postal Service,* 63 M.S.P.R. 513, 518 (1994) (where deciding official did not consider circumstances of falsification offense, but selected a penalty based on the simple fact that a falsification occurred Board will find penalty exceeds the bounds of reasonableness); *Howard v. U.S. Postal Service,* 72 M.S.P.R. 422, 425 (1996) (a penalty which is grossly disproportionate to the offense, in light of the particular circumstances of the case, is an abuse of discretion); *Wentz v. U.S. Postal Service,* 91 M.S.P.R. 176, 185 (2002) (deciding official improperly considered certain matters that should not have been considered at all).

I conclude that no penalty is appropriate in this case, even the minimal penalty of reprimand provided for in the agency's table of penalties. The appellant should have been no more than orally counseled at the time and informed that, despite his past beliefs about requesting/receiving drug samples, his conduct was improper and it should cease immediately. I have no doubt that the appellant would have corrected his behavior that minute as all other providers who testified assured they have done since receiving Sims's January 31, 2001 message about requesting/receiving drug samples at the Togus Center.

DECISION

The agency's action is REVERSED.

ORDER

I ORDER the agency to cancel the reduction in grade and pay and the 45-day suspension and "to retroactively restore the appellant to the position of Supervisory Pharmacist, GS-0660-13, effective November 11, 2001. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I ORDER the agency to pay the appellant by check or through electronic funds transfer for the m~ppropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay the appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. The appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, the appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect cnril the decision of the Board becomes final.

As part of interim relief, I ORDER the agency to effect the appellant's appointment to the position of Supervisory Pharmacist, GS-0660-13. The appellant shall receive the pay and benefits of this position while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order. either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 770l(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency netition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's

order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: William Carroll /s
William Carroll
Chief Administrative Judge

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No. 07-595

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In the Supreme Court of the United States

ALAM SHER, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in determining under the particular circumstances of this case that petitioner may be fairly charged with adequate notice of his immunity under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967).

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In the Supreme Court of the United States

No. 07-595

ALAM SHER, PETITIONER

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DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 488 F.3d 489. The opinion of the district court (Pet. App. 50a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2007. A petition for rehearing was denied on August 3, 2007. The petition for a writ of certiorari was filed on November 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From 1992 until 2001, petitioner was Chief Pharmacist at Togus Medical Center (the hospital), a facility operated by the Department of Veterans Affairs (VA). Pet. App. 3a. Federal regulations generally prohibit fe-

deral employees from accepting items of monetary value from anyone doing business with the employee's agency. 5 C.F.R. 2635.201-2635.203. The hospital also had a policy prohibiting employees from accepting free samples of medications from pharmaceutical company representatives, a practice called "sampling." Pet. App. 3a.

Petitioner requested free samples of the drug Lipitor from drug company sales representatives in June, August, and December 2000, and in January 2001. He received such samples on two occasions in January 2001. Pet. App. 4a. Acting on information from another employee, VA security officers stopped petitioner as he was leaving the hospital on January 29, 2001, and found 672 ten milligram Lipitor samples in his briefcase. *Id.* at 4a-5a.

The VA initiated an investigation and sought to question petitioner, who retained attorney Sumner Lipman to represent him. Pet. App. 5a. Lipman was not present at an interview with a VA investigator on February 1, 2001, in which petitioner admitted receiving free samples of Lipitor from drug company representatives. The parties dispute whether he was given notice of his rights on this occasion and whether he freely consented to the interview; according to the VA, petitioner was informed of his rights at this meeting. *Ibid.* The investigator subsequently presented the case to the United States Attorney's Office for the District of Maine, which verbally declined prosecution. *Ibid.*

The VA then notified petitioner that an additional administrative interview had been scheduled for July 10, 2001. Petitioner sought to postpone the interview because he planned to be on vacation until July 11 and because his attorney, Lipman, was unavailable until July 15. Pet. App. 6a. The VA agreed to postpone the inter-

view only until July 11. *Ibid.* Petitioner appeared at the interview, accompanied by Lipman's partner, Keith Varner. Because Varner voiced concern that the interview would expose petitioner to criminal liability, the VA obtained by fax during the interview a letter from the United States Attorney's Office stating that the Office had "declined criminal prosecution of [petitioner] in favor of administrative action." The letter also stated that the conduct for which prosecution had been considered was petitioner's "request and receipt of drug samples * * * in August of 2000 and January and February of 2001." *Id.* at 7a. Varner then consulted Lipman by telephone, and Lipman expressed concern that the letter left petitioner vulnerable to criminal prosecution. Petitioner ultimately declined to be interviewed, notwithstanding that the VA subsequently alerted Lipman to cases that explained the applicability of use immunity for government employees in petitioner's situation. *Ibid.*; *id.* at 30a-31a.

2. Upon the completion of its investigation, the VA sustained administrative charges that petitioner had solicited free Lipitor samples on five occasions between June 2000 and January 2001, had received and possessed such samples in January 2001, and had failed to cooperate in the administrative investigation in violation of VA regulations. As punishment, the agency imposed a 45-day suspension and a demotion with resulting reduction in pay. Pet. App. 7a-8a.

Petitioner appealed the agency's decision to the Merit Systems Protection Board (MSPB). An administrative law judge (ALJ) initially upheld the agency decision on the sampling charges but overturned the failure-to-cooperate finding on the ground that concerns by petitioner regarding possible criminal prosecution were legitimate.

Pet. App. 8a. The ALJ also determined that the agency's penalty was unduly severe. *Ibid.* On cross-appeals, a panel of the MSPB sustained the agency decision in all respects, concluding, *inter alia*, that the letter supplied by the United States Attorney's Office was sufficient to allay concerns about petitioner's possible future criminal liability. *Id.* at 9a-10a.

Petitioner challenged the MSPB's decision in the United States District Court for the District of Maine, which affirmed the MSPB in all respects. Pet. App. 50a-67a. Relying on the reasoning of a magistrate judge, the district court concluded that the VA had not abused its discretion in disciplining petitioner for failure to cooperate in its investigation because he had received adequate assurance that he would not be prosecuted and had full access to advice of counsel. *Id.* at 66a, 95a-99a.

3. The court of appeals affirmed. Pet. App. 1a-49a. The court focused on whether petitioner received adequate notice of his immunity from prosecution under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). In *Garrity*, police officers under questioning in an administrative investigation were threatened that if they failed to answer, they would be subject to termination. After answering, their statements were used in a criminal prosecution against them. This Court reversed their resulting convictions, holding that the Fifth Amendment's privilege against self-incrimination barred use in subsequent criminal proceedings of statements coerced by threats of administrative disciplinary action. *Id.* at 500. Shortly thereafter, in *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968), the Court held that if a government employee refuses to answer his employer's questions about performance of his official duties *without* being required to waive his use immunity under *Garrity*, the Fifth Amend-

ment is no obstacle to disciplinary action against him. The court of appeals noted that "together, *Garrity* and *Gardner* stand for the proposition that a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer receives immunity from the use of her statements or their fruits in subsequent criminal proceedings, and, consequently, may be subject to such an adverse employment action for remaining silent." Pet. App. 20a.

Turning to the facts here, the court of appeals pointed to letters petitioner had received from the VA quoting regulations that require employees to testify in administrative investigations or face discipline for refusing to do so. These letters were coercive, the court concluded, and thus automatically triggered use immunity under *Garrity*. Pet. App. 22a.

Noting that "no circuit has held that an employee who is represented by counsel is entitled to notice from his employer of his *Garrity* immunity," the court of appeals found it unnecessary to decide that question because it concluded that, "[r]egardless of whether there was any [such] duty, [petitioner] may be fairly charged with such notice under the circumstances present here." Pet. App. 26a, 29a. The court explained that, with Varner present at the interview on which the charge of failure to cooperate was based and Lipman available for consultation by phone, petitioner "had access to counsel of his choice." *Id.* at 30a. Further, the court continued, the VA's letters to petitioner contained sufficient threat of removal to provide notice of *Garrity* immunity. *Ibid.* Finally, the court pointed out that counsel for the VA had referred Lipman—after the interview, but well before the agency undertook disciplinary action against

petitioner—to authorities explaining *Garrity*'s impact. *Id.* at 30a-31a.

In these circumstances, the court held, it was unnecessary to decide whether the VA had a duty to notify petitioner of his *Garrity* immunity because petitioner "may be fairly charged with adequate notice" of that immunity. Pet. App. 32a; see *id.* at 29a (Because we find that petitioner may be charged with notice "[i]n the circumstances of this case, we do not have to decide whether the VA as employer had to give [petitioner] notice of the application and consequences of his *Garrity* immunity.").

Judge Stahl, in dissent, would have answered the question that the panel majority avoided and would have recognized a government disclosure obligation. Pet. App. 39a-49a.

ARGUMENT

The question presented by the petition rests on a faulty premise: that petitioner did not receive notice of his immunity under *Garrity*. The court of appeals decided this case based on the premise that petitioner was "fairly charged with adequate notice of his immunity under *Garrity*." Pet. App. 32a. That factbound decision is correct, and it does not conflict with any decision of this Court or another court of appeals. The broader doctrinal questions raised by petitioner are not presented by this case and, in any event, do not implicate any genuine conflict of authority. Review by this Court is therefore unwarranted.

1. The court of appeals correctly concluded that, whether or not the government has a duty to notify its employees of the application of *Garrity* immunity and its consequences, the VA's decision to discipline petitioner for refusing to respond in an administrative inquiry was

consistent with the Fifth Amendment privilege against self-incrimination, because petitioner is fairly charged in the circumstances of this case with "adequate notice of his immunity under *Garrity*." Pet. App. 32a.

In so concluding, the court did not establish a broad rule that the government need not notify the employee whenever he is represented. Pet. App. 32a n.18 ("If we had concluded that a represented employee with the benefit of use immunity was automatically obliged to answer questions or face discipline, we would not have engaged in the detailed analysis of '[petitioner's] Circumstances'."). Nor did the court express any view about whether a duty to notify exists where the employee has an "objectively reasonable fear" that his statements in an administrative inquiry could be used against him in subsequent criminal proceedings. *Ibid.* (rejecting the dissent's characterization that the court's decision requires an employee to answer questions or face discipline "even where the employee has an objectively reasonable fear that his statements will not be protected by use immunity").

To the contrary, the court of appeals expressly *avoided* the broader doctrinal issues raised by petitioner and concluded that it was not necessary to reach those issues on the record in this case. Pet App. 29a. Specifically, the court pointed to these facts particular to this case: (1) petitioner had access to counsel of his choice, (2) the VA's letters to petitioner contained a clear threat of removal if he refused to answer questions in its administrative inquiry, and (3) the VA expressly alerted petitioner's counsel to cases that explained the application of *Garrity* immunity and its consequences. *Id.* at 30a-31a. Based on those facts, the court of appeals held that

petitioner could be "fairly charged with adequate notice of his immunity under *Garrity*" and, thus, any potential duty to notify him had been satisfied. *Id.* at 32a.

The First Circuit's application of an "adequate notice" standard to the facts of this case was reasonable and does not appear to differ in any meaningful way from petitioner's desired rule. Moreover, because the record supports the court of appeals' conclusion that petitioner received adequate notice, the First Circuit's factbound judgment would not be affected even if this Court adopted a categorical rule imposing a notice obligation. Indeed, although the fact is contested, the VA's position is that it specifically informed petitioner of his rights under *Garrity* at his initial February interview. Pet. App. 5a. Accordingly, this case is an unsuitable vehicle for this Court's review of the question presented —which assumes *lack* of such notice, see Pet. i—and there is no reason for this Court to grant certiorari to review the court of appeals' factbound conclusion that petitioner received adequate notice.

2. Petitioner argues (Pet. 8-14) that the courts of appeals have split on the question whether the government has an obligation to provide "actual notice" of *Garrity* immunity before it can discipline an employee for refusal to respond in an administrative inquiry focused on his official duties. Because the court of appeals decided this case based on the premise that petitioner received "adequate notice" of his *Garrity* immunity, that argument has little, if any, practical significance. In any event, examination of the decisions reveals no clear conflict among the courts of appeals on the notice question. Moreover, none of those decisions has addressed how the presence of counsel for the employee might affect the notice requirement (at least since *Garrity*, *Gardner*,

and their progeny have become established law), and thus this case does not implicate any purported conflict.

a. Petitioner cites decisions from several circuits suggesting that the government must provide its employees notice of *Garrity* immunity and its consequences before disciplining them for refusing to cooperate in an administrative investigation. Pet. 8-10 (citing decisions from the Second, Sixth, Seventh, District of Columbia, and Federal Circuits). Petitioner then cites decisions from the Fifth and Eighth Circuits that he says conflicts with the "majority" rule. Pet. 12-13 (citing *Gulden* v. *McCorkle*, 680 F.2d 1070 (5th Cir. 1982), and *Hill* v. *Johnson*, 160 F.3d 469 (8th Cir. 1998)). However, neither of those decisions creates a clear conflict.

In *Gulden*, the Fifth Circuit found no affirmative duty to "tender" *Garrity* immunity where employees had refused to appear for questioning in an administrative investigation. 680 F.2d at 1075. The court, in distinguishing some of the same circuit court cases cited by petitioner, expressly "decline[d] to answer the highly speculative question whether an affirmative grant of immunity might, *at some point*, be necessary" in the context of a "particularized, specific inquiry." *Ibid.* Therefore, the Fifth Circuit held only that no notice to employees is necessary at the very threshold of an inquiry—a conclusion with which the Seventh Circuit has expressly agreed. See *Atwell* v. *Lisle Park Dist.*, 286 F.3d 987, 991 (2002) ("we have already registered our agreement with the Fifth Circuit that there can be no duty to warn until the employee is asked specific questions"). Moreover, the court's use of "tender" is unclear; "tender" might entail something other than advising the employee of *Garrity* immunity and its consequences.

Thus, *Gulden* may have held only that the government has no duty to make an explicit grant of immunity.

Likewise, in *Hill*, the Eighth Circuit appears to address only the issue of whether the employer's "failure affirmatively to offer immunity" constituted "an impermissible attempt to compel a waiver of immunity." 160 F.3d at 471. In finding no compelled waiver, the *Hill* court did not address the scope of the employer's duty to notify an employee of *Garrity* immunity—the question presented by petitioner here. Moreover, *Hill* was decided in the qualified immunity context, such that the inquiry was simply whether the government employer violated "clearly established" law. *Id.* at 471-472. The decision thus does not reflect the Eighth Circuit's *de novo* consideration of the issue.

b. Regardless of any purported conflict among the courts of appeals based on the aforementioned decisions, such a conflict would not be implicated here because, as discussed above, the First Circuit determined that petitioner was provided adequate notice to begin with and because, as an independent factor, petitioner was represented by counsel.

With the exception of a single outdated case, none of the circuit court cases cited by petitioner addresses employees represented by counsel. Pet. App. 26a ("no circuit has held that an employee who is represented by counsel is entitled to notice from his employer of his *Garrity* immunity"). For example, the Sixth Circuit has observed that, under *Garrity*, a government employer "who compels an employee to make incriminating statements must * * * promise not to use those statements in a criminal proceeding against the employee," but has not addressed whether such an express promise is necessary when the employee is represented by counsel.

See *McKinley* v. *City of Mansfield*, 404 F.3d. 418, 439 n.24 (2005). Significantly, in considering whether the employee had been compelled to make incriminating statements, the court found it "relevant" that a representative who accompanied him at one administrative interview was "not an attorney." *Id.* at 433 n.16. Similarly, the Second Circuit has upheld the disciplining of non-cooperating employees who were provided express notice of use immunity *and* were represented by counsel, but did not address whether *both* of those conditions were necessary to its conclusion. See *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 426 F.2d 619, 627 (1970), cert. denied, 406 U.S. 961 (1972). Finally, the Seventh Circuit has expressly questioned, but did not decide, whether that circuit's rule requiring the government to warn of *Garrity* immunity "has any possible application when the employee has a lawyer." *Atwell*, 286 F.3d at 991.[1]

The lone exception comes from the Court of Claims in *Kalkines* v. *United States*, 473 F.2d 1391 (1973). In *Kalkines*, the administrative investigation of the government employee took place shortly after this Court's decision in *Garrity* and before this Court's decision in *Gardner*. The *Kalkines* court ruled that, at that stage, the impact of *Garrity* and its progeny remained uncertain even to "knowledgeable people," and notice to an employee regarding his immunity under *Garrity* was therefore necessary even though he was represented by

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[1] *Atwell*'s actual holding is that the government did not violate the Fifth Amendment by disciplining an employee who, acting on advice of counsel, refused to be interviewed in an administrative investigation. If a duty to warn a counseled employee existed at all, the *Atwell* court concluded, it arose only when the employee was asked a specific question. 286 F.3d at 991.

counsel. *Id.* at 1396. *Kalkines* provides no reliable guidance on this issue now, 40 years after the Court's well-recognized teachings in *Garrity* and *Gardner*. The Federal Circuit's subsequent decisions applying *Garrity* do not illuminate how the presence of counsel for the employee affects any government duty to provide notice of immunity.[2]

In sum, none of the circuit court decisions addressing the government's notice obligations under *Garrity* decides the impact of counsel on those obligations. Thus, none of those decisions genuinely conflicts with the First Circuit's decision that, in light of the presence of counsel and other factual circumstances, any notice obligation was satisfied here. See Pet. App. 29a, 32a.

3. Petitioner argues that the court of appeals' decision is inconsistent with decisions of this Court. That argument too is incorrect.

a. Petitioner contends that the court of appeals departed from this Court's precedents by concluding that an employee loses his right to refuse to respond in an administrative inquiry if "it can be predicted" that his answers would be protected by immunity. Pet. 15. But the court of appeals made no such holding. To the contrary, it observed (Pet. App. 21a) that *Garrity* immu-

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[2] In *Weston* v. *Department of Housing & Urban Development*, 724 F.2d 943 (Fed. Cir. 1983), the court upheld removal of an employee who was given full notice of his rights under *Garrity* and nevertheless, on advice of counsel, refused to cooperate in an internal agency investigation. In *Modrowski* v. *Department of Veterans Affairs*, 252 F.3d 1344 (Fed. Cir. 2001), the court reversed an agency's ruling that an employee had failed to cooperate in an investigation, concluding that the agency had provided the employee with ambiguous notice regarding his immunity from prosecution and had denied him an adequate opportunity to consult counsel. *Id.* at 1353-1354.

nity arises *automatically* from the threat of discipline for refusal to answer. See *Uniformed Sanitation Men Ass'n*, 426 F.2d at 626 ("the very act of * * * telling the witness that he would be subject to removal if he refused to answer was held [in *Garrity*] to have conferred such immunity"). As the court found, the relevant VA correspondence "clearly contained a threat of removal sufficient to provide notice of the application of immunity under *Garrity*." Pet. App. 30a. No speculative "prediction" about potential use of petitioner's answers in a future criminal prosecution was required.

Contrary to petitioner's suggestion (Pet. 15-16), the First Circuit's approach is not in tension with *Pillsbury Co.* v. *Conboy*, 459 U.S. 248 (1982). There, a witness who had testified before a grand jury pursuant to a grant of immunity was held in contempt by a district court in a subsequent civil proceeding when he refused to answer the same questions, or confirm his prior answers, during a deposition. In ruling that the witness could not be compelled to answer, this Court noted that even if his deposition responses were identical to those he gave before the grand jury, additional information might well be elicited in cross-examination. Further, the Court pointed out that the district court had no authority to immunize the witness for his deposition testimony because granting immunity is "peculiarly an executive" responsibility. *Id.* at 261. The *Pillsbury* Court held that, in these circumstances, the witness could not be required to rely on the district court's "predictive judgment" that a court in any future criminal prosecution he might face would be obligated to exclude the deposition testimony from evidentiary use. *Ibid.* Here, in contrast, the automatic immunity available under *Garrity* means that no such prediction by petitioner is required.

None of the other decisions of this Court cited by petitioner (Pet. 16) conflicts with the decision below either. In *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), the Court held that state contractors who were threatened with disqualification from state business for refusal to waive immunity when called to testify about their contracts were entitled to the same automatic immunity that is available under *Garrity* to state employees who are threatened with discipline. By extending *Garrity*'s automatic protection to private contractors, *Lefkowitz* casts no light on the existence or extent of any obligation to provide notice of that immunity. In *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), the Court held that a witness who is not threatened with any penalty must affirmatively assert his privilege against self-incrimination in order to claim immunity. The Court expressly distinguished *Garrity*, on the ground that it (like this case) involved a threat of punishment, which gave rise to a "self-executing privilege." *Id.* at 435. *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), held that an inmate who remained silent in a prison disciplinary proceeding could be found guilty of an infraction if other evidence supported that finding. The Court again distinguished *Garrity*, noting that the adverse consequence for the witness there resulted from his refusal to testify "standing alone and without regard to other evidence." *Id.* at 318. The Court's observations that *Garrity* therefore required immunity to be "offered" (*id.* at 316) or "grant[ed]" (*id.* at 318) by no means recognize an affirmative duty to notify the witness of the immunity automatically triggered by the government's threat of adverse action against him.

b. Contrary to petitioner's contention (Pet. 17), the decision of the court of appeals is also consistent with

the principle that the Fifth Amendment privilege against self-incrimination "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar* v. *United States*, 406 U.S. 441, 445 (1972). Relying on three aspects of the record—petitioner's access to counsel, the VA's explicit threat of discipline for refusal to answer, and the VA's provision to petitioner's counsel of authorities describing *Garrity*'s impact—the court of appeals concluded that petitioner *lacked* a reasonable basis for believing that answering would place him at risk of criminal prosecution. Pet. App. 29a-32a. Whether the court correctly evaluated that record evidence is a factbound issue not warranting this Court's review.

4. Finally, even if petitioner prevailed on the issue he presents and the failure-to-cooperate charge were dismissed, it is unclear whether there would be any practical impact on petitioner's ultimate penalty. The penalty that the VA imposed and that the MSPB upheld —suspension and demotion—is fully supported by, and well-within the range of penalties for, Sher's uncontested violation of the gift ban standing alone. See Pet. App. 124a (noting that the agency's table of penalties included removal for a first offense); *Heffron* v. *United States*, 405 F.2d 1307, 1313 (Ct. Cl. 1969) (affirming discharge of 15-year employee for accepting a case of liquor in violation of gratuity rules). This factor further counsels against this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ALAM SHER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Nine federal circuits and the courts of at least thirteen states are squarely in conflict over whether a public employee may be punished for refusing to make self-incriminating statements, absent prior notice that any statements cannot be used against him in criminal proceedings. (Pet. 8-14.) Respondent implausibly contends that this widely-recognized conflict purportedly is not "genuine" (Opp. 6), and, alternatively, seeks to dismiss this case as a "factbound" dispute that is an inappropriate vehicle for resolving the conflict (*id.*). Neither of these contentions has merit.

First, the claim that there is no "genuine" conflict is demonstrably specious. Respondent can make this claim only by (1) reading the Fifth and Eighth Circuit decisions (on the minority side of the split) contrary to their own language and contrary to how subsequent courts have consistently understood them; (2) ignoring, without explanation, the square holdings of multiple state high court decisions discussed in the petition (Pet. 13-14); and (3) likewise completely ignoring a recent decision by a divided Ninth Circuit panel that expressly recognizes, and deepens, the conflict. In short, the existence of a deep and genuine conflict is inarguable.

Second, respondent's efforts to portray this case as an inappropriate vehicle for resolving the conflict are equally ill-founded. Respondent implies that there is a factual issue as to whether petitioner may, in fact, have received notice of his immunity, but the findings below expressly resolve that issue, and—more fundamentally—neither this issue nor any other identified by respondent could even conceivably

prevent this Court from reaching and resolving the issue in conflict.

A. There Is A Deep And Undeniable Conflict Among The Lower Courts That Merits This Court's Review.

As the Ninth Circuit expressly recognized less than three months ago, there is a stark conflict in the courts of appeals over whether the government must notify an employee of his immunity under *Garrity v. New Jersey*, 385 U.S. 493 (1967), before it may punish him for refusing to make incriminating statements in an administrative investigation. *See Aguilera v. Baca*, 510 F.3d 1161, 1171-73 (9th Cir. 2007); *id.* at 1177-79 (Kozinski, C.J., dissenting). At least eight Circuits, in addition to the court below, are involved: five Circuits prohibit such punishment in the absence of prior notice, while the Fifth and Eighth Circuits—recently joined by the Ninth—permit punishment even in the absence of notice. (Pet. 8-13.) The state courts are also deeply divided, with at least nine states holding that notice is required by the federal Constitution, and the highest courts of four states holding to the contrary. (Pet. 11-14.)

In the face of this deep division, respondent implausibly claims that there is "no clear conflict." (Opp. 8-10.) This contention—which is supported solely by a strained attempt to deny that the Fifth and Eighth Circuits adopt the minority view (Opp. 9-10)—is simply untenable.

As an initial matter, respondent's reading of the Fifth and Eighth Circuit cases is insupportable. Respondent claims that *Hill v. Johnson*, 160 F.3d 469

(8th Cir. .1998), ruled only on whether qualified immunity could be overcome—not on whether there was a Fifth Amendment violation at all—and that *Hill* also purportedly "did not address the scope of the employer's duty to notify." (Opp. 10.) Both claims are decisively refuted by *Hill* itself. *Hill* held that even where a public employee was not told that his answers could not be used against him, his dismissal for refusing to incriminate himself "*does not violate*" the "privilege against self-incrimination." 160 F.3d at 471 (emphasis added) (employer only prohibited from compelling employee to affirmatively waive "immunity from the use of [his] answers"). In short, *Hill* plainly *did* address the consequence of a failure to notify, and plainly held that dismissing an employee in the absence of such notice "does not violate" the privilege—*not* merely that any violation was not "clearly established."

Similarly, respondent describes *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982)—which upheld the discharge of public employees who invoked their Fifth Amendment privilege and refused to take a polygraph exam—as holding only that notice is unnecessary "at the very threshold of an inquiry." (Opp. 9.) But respondent fails to note *Gulden*'s additional holding that, in general, there is no obligation to provide an "affirmative tender of immunity"—meaning notice of immunity[1]—and no

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[1] Respondent purports to find the phrase "affirmative tender of immunity" ambiguous (Opp. 9), but *Gulden* clearly uses the phrase to refer to Seventh Circuit cases requiring that the employee be advised of his *Garrity* immunity. 680 F.2d at 1074; *see also* Pet. App. 25a (adopting same interpretation of phrase).

"constitutional infirmity" unless the employer "demand[s] ... the *waiver* of [the] immunity" automatically conferred by *Garrity*. 680 F.2d at 1074-75 (emphasis added); *see also id.* at 1076 (one holding is that no Fifth Amendement violation absent request for affirmative waiver of immunity).

Moreover, respondent's implausibly narrow reading of *Hill* and *Gulden* is rejected by subsequent case law, which recognizes that both cases hold—contrary to the rule of the majority of Circuits—that no notice of *Garrity* immunity is necessary. Thus, the Ninth Circuit majority and dissent both recently recognized in *Aguilera v. Baca* that what Chief Judge Kozinski described as "the harsh and unfair rule of the Fifth and Eighth Circuits" permits punishment of "officers who refuse to make self-incriminating statements," even when they have not received notice and therefore "may not be sure whether or not they have immunity." 510 F.3d at 1177-78 (Kozinski, C.J., dissenting) (citing *Hill* and *Gulden*); *id.* at 1172 n.6 (majority opinion); *see also* Pet. App. 25a-26a (*Gulden* found that "the employer need not advise the employee of the immunity conferred by *Garrity*") (emphasis omitted); *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002) (describing both *Hill* and *Gulden* as rejecting Seventh Circuit notice requirement); *Debnam v. N.C. Dep't of Corr.*, 432 S.E.2d 324, 330 (N.C. 1993) (*Gulden* rejects requirement that employee be given notice).

In any event, even aside from the Fifth and Eighth Circuits, respondent offers no explanation for ignoring numerous other cases on the minority side of the conflict. Most notably, the Ninth Circuit's recent decision in *Aguilera v. Baca* expressly recognized the

circuit split, and expressly rejected the "bright-line rule" adopted by the majority of Circuits "requir[ing] public employers to expressly inform employees" that their statements cannot be used to incriminate them "before taking disciplinary action against the employee for refusing to speak." 510 F.3d at 1172-73 & n.6. In contrast, Chief Judge Kozinski, in dissent, would have adopted the majority rule—in his view, the "only constitutionally permissible rule"—and held "that if the government doesn't expressly inform public employees that any statements they give can't be used against them in criminal proceedings, it may not punish them for refusing to speak." *Id.* at 1177.

Respondent also completely fails to address the multiple *state* high court cases cited in the petition (Pet. 11-14), including, in particular, the four state high courts—North Carolina, New York, Nebraska, and California—adopting the minority side of the federal constitutional question on which the courts are split. (*See id.* at 13-14.) Nor does respondent offer any explanation for omitting these cases, which were discussed in the petition and are no less relevant than federal court of appeals cases to the existence of a conflict meriting this Court's review. *See* Sup. Ct. R. 10.

In sum, the existence of a genuine and widespread conflict on this important issue of federal constitutional law is beyond reasonable dispute.

B. This Case Squarely Presents The Issue On Which The Lower Courts Are Divided.

Respondent identifies a potpourri of case-specific reasons why this case assertedly is not an attractive vehicle for resolving the Fifth Amendment notice

issue on which the lower courts are divided. None has merit.

1. Respondent's principal contention (Opp. 6-8) is that the notice question on which the courts are in conflict purportedly is not presented here. In particular, respondent contends that the decision below turned on a "factbound" determination that petitioner *did* receive notice, and that accordingly "this case is an unsuitable vehicle for the Court's review of the question presented—which assumes *lack* of notice." (*Id.* at 8 (emphasis in original).) Respondent further suggests that this factual determination would (or could) prevent this Court from reaching and resolving the Fifth Amendment notice issue.

As an initial matter, this argument mischaracterizes the First Circuit's decision. The court held that petitioner could be "charged with" notice of his *Garrity* immunity (Pet App. 32a), *not* that petitioner actually *received* such notice. Indeed, the holding that petitioner could be "charged with" notice—based largely on the fact petitioner had counsel--was actually a rationale for concluding that petitioner could be punished *notwithstanding the failure to provide actual notice*. (Pet. App. 29a.) And, despite protesting that it sought to avoid broad rules, the First Circuit in fact squarely aligned itself in opposition to the majority "bright-line rule," *Aguilera*, 510 F.3d at 1173, that "if the government doesn't expressly inform public employees that any statements they give can't be used against them in criminal proceedings, it may not punish them for refusing to speak," *id.* at 1177 (Kozinski, C.J., dissenting). *See* Pet. App. 32a-33a n.18 (rejecting "a

broad rule imposing a duty upon the government employer to warn the employee about . . . *Garrity* immunity, even in cases where the employee is represented by counsel").[2]

More fundamentally, there is simply no basis for the suggestion that factual issues concerning notice might prevent this Court from resolving the question presented: the findings below leave no room to dispute the absence of notice. Respondent's attempt to raise doubts on this score—by asserting that "the VA expressly alerted petitioner's counsel to cases that explained the application of *Garrity* immunity" (Opp. 7)—is a red herring. As the ALJ found—in findings that have never been questioned—this "alert[]" occurred *after* the July 11, 2001 interview for which petitioner was penalized. Pet. App. 158a-159a. In short, petitioner was charged only for his silence on July 11, 2001, *see id.* at 111a, and the ALJ's dispositive factual findings definitively establish that at that time petitioner had not even arguably received notice.

Nor can respondent make the VA "alert[]" relevant by arguing that petitioner could somehow be penalized (contrary to the terms of the charging instrument) for failing to cooperate *after* receiving the post-July 11 "alert[]." As noted in the petition (Pet. 18 n.6)—and not disputed by respondent—the ALJ found that petitioner expressly *did* offer to return for an interview under the immunity

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[2] The First Circuit's belief that it was avoiding "broad" grounds appears to have been based largely on its erroneous understanding that petitioner's representation by counsel made the case unusual. *See infra* p. 11.

described in the cases cited by the VA, Pet. App. 159a, and the VA chose not to schedule another interview.[3] Thus, the VA alert provides no basis for disputing the complete absence of notice to petitioner at the relevant time, and therefore no basis on which the Court might fail to reach the issue of whether such notice is constitutionally required.

Even more far-fetched is respondent's mining of the record for the possibility that petitioner may have received notice at a *previous* interview he attended without counsel, in February 2001, that his statements at that interview could not be used to incriminate him. (Opp. 8.) There is no suggestion in the record that petitioner was informed that this immunity would apply to *future* interviews, and the First Circuit (as well as the district court, MSPB, and ALJ) properly declined to attach any significance to it. Indeed, if petitioner was notified prior to the February 2001 interview that his statements could not be used to incriminate him, the VA's failure to provide a similar notice in July can only have suggested to petitioner that his statements in July were *not* subject to the same protection.[4] The

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[3] To be sure, the opinion below observes—without citation—that petitioner could have "schedule[d] another interview" after receiving the VA's alert. Pet. App. 31a. However, the First Circuit appears to have simply overlooked the ALJ's contrary finding of fact, and respondent does not contend that the court's unsupported observation casts any doubt on the ALJ's dispositive finding.

[4] That suggestion would have been consistent with the VA's apparent position that petitioner was entitled to fewer protections once criminal prosecution was declined in March

February 2001 notice, if it was given at all, can hardly have served as an assurance that his statements in July 2001 would be protected by use immunity.

In sum, there are no "factbound" issues that could prevent this Court from reaching and deciding the question presented.

2. Respondent also contends that the fact petitioner was represented by counsel is "an independent factor" that prevents this case from implicating the conflict in the lower courts. This contention is entirely unpersuasive; moreover, to the (minor) extent the presence of counsel is relevant at all, it is a factor in *favor* of granting review.

First, as respondent concedes, one of the seminal cases recognizing a right to notice of an employee's *Garrity* immunity, *Kalkines v. United States*, 473 F.2d 1391 (Ct. Cl. 1973), expressly rejected the argument that an employee's representation by counsel should affect the notice required. *Id.* at 1396. Respondent attempts to dismiss *Kalkines* as "outdated" (Opp. 10), arguing that it was based on the unfamiliarity of the *Garrity* rule to contemporary counsel and "provides no reliable guidance" now, "40 years after the Court's well-recognized teachings in *Garrity* and *Gardner*." (*Id.* at 12.) However, the premise of this argument—that the "teachings" of *Garrity* and *Gardner* are so "well-recognized" that

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2001 and the investigation became an administrative one. *See* Pet. App. 6a.

counsel will routinely be familiar with them—cannot withstand scrutiny. The First Circuit conceded below that "the consequences of *Garrity* immunity are not self-evident," Pet. App. 23a, and Chief Judge Kozinski observed that even he "had no idea" that "public employees who are pressured to give a statement . . . have immunity," "even though [he] ha[s] been a government employee involved in law-related activities for almost three decades." *Aguilera*, 510 F.3d at 1179.

In addition, respondent ignores—again without explanation—multiple state decisions that, in conflict with the decision below, recognize a right to notice despite an employee's representation by counsel. *See Carney v. City of Springfield*, 532 N.E.2d 631, 634 (Mass. 1988) (noting involvement of counsel); *Jones v. Franklin County Sheriff*, 555 N.E.2d 940, 942 (Ohio 1990) (same); *Gandy v. State ex rel. Div. of Investigation & Narcotics*, 607 P.2d 581, 583 (Nev. 1980) (same); *Gardner v. Mo. State Highway Patrol Superintendent*, 901 S.W.2d 107, 110 (Mo. Ct. App. 1995), *Mot. for Transfer to Sup. Ct. denied* (Jul. 25, 1995) (same); *Banca v. Town of Phillipsburg*, 436 A.2d 944, 948 (N.J. Super. Ct. App. Div. 1981) (same).

Moreover, even aside from these cases, the majority rule is accurately described in *Aguilera*—a case which itself involved employees who declined to make statements "based on the advice of counsel," 510 F.3d at 1166, but attached no significance to the involvement of counsel—as a "bright-line rule." *Id.* at 1173. Respondent offers little reason to believe that the courts adopting this bright-line rule would abandon it in the frequent cases in which an employee is represented by counsel.

Indeed, to the extent petitioner's representation by counsel at the time he invoked the privilege is relevant at all, it is a factor that weighs in favor of granting review. As explained more fully in the petition (Pet. 19-20), an employee's representation by counsel is a common feature in cases addressing this issue, and the presence of that feature in this case will allow this Court to resolve not only the question whether notice of *Garrity* immunity is required, but also whether that obligation may be satisfied, for a represented employee, by something other than actual notice.

3. Respondent also claims (Opp. 15) that certiorari should be denied because it is possible that—even if petitioner were to prevail in this Court, and his failure-to-cooperate charge were dismissed—petitioner's suspension and demotion arguably could be upheld on remand on the basis of the separate charge that petitioner violated the VA's gift ban. This contention borders on the frivolous. The First Circuit upheld the penalties against petitioner solely on the basis of his alleged "failure to cooperate with an investigation," and did not address any other ground. Pet. App. 38a. There is no claim that this issue could prevent this Court from reaching the question presented, and no claim that it will in any way reduce petitioner's incentive to zealously pursue a reversal in this Court.

C. The Decision Below Conflicts With Decisions Of This Court

The decision below also conflicts with decisions of this Court. (Pet. 14-16.) Respondent denies that the decision conflicts with *Pillsbury Co. v. Conboy*, 459

U.S. 248 (1983), because—even though *Pillsbury* holds that a witness cannot be required to make incriminating statements based on a "predictive judgment" that a future court will afford him use immunity—the "automatic immunity available under *Garrity* means that no such prediction by petitioner is required." (Opp. 13.) This simplistic assertion is completely unsupported, and respondent offers no response to petitioner's demonstration that determining whether *Garrity* immunity has been triggered necessarily requires *numerous* "predictive judgments." (*See* Pet. 18-19 & n.7.)

In addition, respondent concedes that the Fifth Amendment privilege may be asserted by a witness to protect any statements he "reasonably believes" could be used to incriminate him, *Kastigar v. United States*, 406 U.S. 441, 445 (1972), but contends that the First Circuit applied this rule. (Opp. 15.) However, respondent is unable to point to any specific language in the lower court opinion purportedly applying this rule, and, again, offers no response to the petition's demonstration (Pet. 17-19) that the First Circuit clearly failed to apply it.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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